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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

Nos. 763-769

FRANK FITZGERALD, TRUSTEE FOR MT. FOREST FUR FARMS OF AMERICA, INC.,

Petitioner,

v.

GULF REFINING COMPANY OF LOUISIANA, GULF REFINING COMPANY, HUMBLE OIL AND REFINING COMPANY, SHELL OIL COMPANY, INC., FREEPORT SULPHUR COMPANY, and ERNEST COCKRELL, GULF REFINING COMPANY OF LOUISIANA, ET AL.,

Respondents.

No. 770

FRANK FITZGERALD, TRUSTEE FOR MT. FOREST FUR FARMS OF AMERICA, INC.,

Petitioner,

v.

ERNEST COCKRELL, HIS CURATOR AD HOC, BRUCE NUNEZ, AND THEIR ATTORNEYS, S. W. PLAUCHE, AND THE LAW FIRM OF HEROLD, COUSIN & HEROLD,

Respondents.

No. 771

FRANK FITZGERALD, TRUSTEE FOR MT. FOREST FUR FARMS OF AMERICA, INC., MORAN CORPORATION OF THE SOUTH AND ISAAC S. HELLER,

Petitioners,

v.

ERNEST COCKRELL, SIDNEY L. HEROLD, SUMTER P. COUSIN AND SAMUEL L. HEROLD; AND S. W. PLAUCHE AND S. W. PLAUCHE, JR., COMPOSING THE LAW FIRM OF PLAUCHE & PLAUCHE,

Respondents.

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

ROBERT S. MARX,
FRANK E. WOOD,
EUGENE D. SAUNDERS,
ELDON S. LAZARUS,
ISAAC S. HELLER,
Attorneys for Petitioners.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1941

No._____

In the Matter of
MT. FOREST FUR FARMS OF AMERICA, INC.,
a Delaware Corporation,
Debtor.

FRANK FITZGERALD, Trustee for MT. FOREST FUR FARMS OF AMERICA, INC.,
Petitioner,
v.
GULF REFINING COMPANY OF LOUISIANA, et al.,
Respondents.

FRANK FITZGERALD, Trustee for MT. FOREST FUR FARMS OF AMERICA, INC.,
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FRANK FITZGERALD, Trustee for MT. FOREST FUR FARMS OF AMERICA, INC. et al.,
Petitioners,
v.
ERNEST COCKRELL, et al.,
Respondents.

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

(All Italics and bold face type are supplied unless otherwise indicated)

To the Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioners, Frank Fitzgerald, Trustee for Mt. Forest Fur Farms of America, Inc., The Moran Corporation of the South, Inc., and Isaac S. Heller, respectfully represent unto the Court:

This is a petition for writs of *certiorari* to the United States Circuit Court of Appeals for the Sixth Circuit

to review a decision and judgments made and entered in said Circuit Court of Appeals on August 15, 1941 (Hicks, Hamilton and Martin, Circuit Judges sitting). (R. V-2521-22; R. No. 8416-265; R. No. 8894-132)

The decision and judgments sought to be reviewed reversed the judgment of the District Court, and, without considering the merits, dismissed for want of jurisdiction consolidated appeals Nos. 8802-07 and cross-appeal No. 8808, wherein petitioner Frank Fitzgerald, Trustee for Mt. Forest Fur Farms of America, Inc., debtor, was the appellee and cross-appellant and Ernest Cockrell (a resident of Texas), Gulf Refining Company of Louisiana (a Louisiana corporation), Gulf Refining Company (a Delaware corporation), Humble Oil and Refining Company (a Texas corporation), Shell Oil Company, Inc., (a Virginia corporation) and Freeport Sulphur Company (a Delaware corporation) were the appellants and cross-appellees. The decision also reversed the decrees of the District Court and dissolved interlocutory injunctions theretofore entered in two ancillary appeals, cases Nos. 8614 and 8894, wherein the petitioners were appellees and the respondent Ernest Cockrell and his counsel were appellants.

The appeals to the United States Circuit Court of Appeals in the main cases (8802-08) were taken from a judgment entered by the United States District Court for the Eastern District of Michigan, Southern Division, sitting as a court of bankruptcy in the reorganization proceedings of the Mt. Forest Fur Farms of America, Inc., debtor. The judgment, which sought to protect the debtor's property from waste and depletion by the respondents, held the debtor to be the owner of all the land

and seven-eighths of the minerals* in a tract of 52,000 acres of marsh land owned by the debtor and located near the Gulf of Mexico in Louisiana, and further held the respondents to have no color or right of title to said minerals so owned by the debtor. (R. I-336-341)

On application of petitioners the issuance of the mandate of the Circuit Court of Appeals was, on the 15th day of October, 1941, stayed to afford petitioners an opportunity to apply to this Court for a writ of certiorari. (R. V-2587-2592)

SUMMARY STATEMENT

This case relates to the mineral rights (principally sulphur and oil) of Mt. Forest Fur Farms of America, Inc., the debtor herein, in 52,000 acres of marsh land located near the Gulf of Mexico in Louisiana. It is generally acknowledged that this tract is one of the most valuable parcels of mineral land known to the civilized world.

Mt. Forest owns the fee simple title to the land, subject only to a burden of such mineral rights, if any, which the respondents may have (R. IV-1540-45), and for many years it has been in actual, open and undisputed physical possession of said lands. (R. I 312-313)

The debtor is in voluntary corporate reorganization proceedings under the Chandler Act and one of the petitioners herein, Frank Fitzgerald, is the trustee therefor, appointed by the United States District Court at Detroit,

* Due to an outstanding fractional interest, not involved herein, the accurate figure is best described as 7/8ths of 127/150ths, but for the sake of convenience we refer to it herein as 7/8ths.

where the proceedings are pending and where this suit originated. (R. I-305)

Mt. Forest purchased the land involved in 1927 from Ernest Cockrell, one the respondents herein.* The pertinent facts relative to the purchase of said land, as shown by the record are as follows:

On February 3, 1927, Cockrell offered, in writing, to sell the land to Mt. Forest

> "subject to reservation of *one-eighth of the minerals.*" (R. IV-1510)

On February 8, 1927, Cockrell telegraphed Mt. Forest that the land

> "* * * lies in a section that will be developed for oil stop trapping rights alone worth more than price asked for land." (R. IV-1511)

On March 12, 1927, a contract of sale, composed and typewritten by Cockrell personally, was executed, calling for the conveyance of a fee simple title

> "subject to a perpetual minerals reservation *equal to one-eighth of all minerals* * * *." (R. IV-1518; I-309)

On April 11, 1927, in consummation of his contract of sale Cockrell executed and delivered to Mt. Forest a deed of general warranty containing the following reservation:

---

* The original company was a Michigan corporation known as Mt. Forest Fur Farm. The debtor, Mt. Forest Fur Farms of America, Inc., is a Delaware corporation which succeeded to the rights of the Michigan company. (R. I-312) For the sake of convenience, we shall refer to said companies interchangeably as "Mt. Forest".

> "This Vendor is vested with and specially retains for himself, his heirs and assigns, and reserves from this sale, *a perpetual royalty equal to one-eighth of all minerals*, including oil, gas and sulphur, which may be found in, under, upon or beneath the lands herein above described, together with perpetual and exclusive rights to make and execute mineral leases on all or any portion of said lands for the exploration, development, production and marketing of any and all of *said minerals*, and also including perpetual rights of ingress and egress solely for said purpose of exploration, development, production and marketing of *said minerals*, at all times, and likewise the use of so much of the surface of said premises as may be found necessary and convenient for the exploration, development, production and marketing of *said minerals* which may be found and produced from said premises." (R. IV-1541)

This reservation has been aptly described by the Court of Appeals as containing "obvious ambiguity" and being the "fundamental *casus belli*" in the instant case. (R. V-2524-25) The District Court held likewise. (R. I-314)

The factual questions presented by this reservation are twofold: (a) What portion of the minerals did Cockrell reserve under said reservation? and (b) What is the extent of his power to lease? Cockrell and the oil and sulphur company respondents (whose rights emanate solely from Cockrell) claim that Cockrell reserved all the minerals, together with the power to lease all the minerals. Your petitioners asserted, and the Trial Court found as a fact, that only one-eighth of the minerals had been reserved by Cockrell; that his power to lease was limited to said one-eighth; and that neither

Cockrell nor the oil and sulphur company respondents had either color or right of title to or possession of Mt. Forest's seven-eighths of the minerals. (R. I 318-19)

At the time of the purchase of this land by Mt. Forest from Cockrell it was not definitely known that the property contained oil or other minerals. The record plainly shows, however, that Cockrell made full use of the oil possibilities as an inducement towards the sale. (R. IV-1511; I-309)

About a year after the purchase of the land by Mt. Forest, the oil company respondents became interested in the oil possibilities. On March 16, 1928, Cockrell purported to lease an undetermined interest in the minerals in said lands to respondent Gulf Refining Company of Louisiana; and Gulf, without title examination or opinion of counsel, and without the knowledge or consent of Mt. Forest, accepted said lease from Cockrell and paid him a bonus of Twenty-five Thousand ($25,000.00) Dollars therefor. (R. IV 2202; 2204; 1572-4; III-1160-63)

Thereafter, Gulf entered into a pooling agreement with the respondents Shell and Humble. (R. IV-1663-73) Shell had a mineral lease on a then outstanding fractional interest in the property. * Humble had a mineral lease from the State of Louisiana covering lake-bed property not covered in the deed from Cockrell to Mt. Forest. (R. IV-1806)

Oil was discovered on the property in June, 1931. The debtor, which had become involved in financial diffi-

* This fractional interest of 23/150ths was owned by The Moran Corporation of the South, one of the petitioners herein, and was leased to Shell. All of the mineral rights in this fractional interest were reserved by Moran and are not involved herein. (R. IV-1834; 1553-64)

culties and factional strife among its shareholders as early as March 1930, was placed in a state court receivership in Detroit, Michigan, two months after oil was discovered. This receivership, together with the attendant internal dissension, continued until August 15, 1938, when the debtor filed a voluntary petition for reorganization under the Bankruptcy Act. (R. I-348)

In 1932, Gulf, Shell and Humble joined in a sub-lease of their sulphur rights to the respondent Freeport Sulphur Company. (R. IV-1855) In 1933, the largest and most valuable sulphur deposit in the world was discovered in this property. From 1933 to date, over $25,000,000 in oil and sulphur have been extracted from the debtor's property, but not one cent thereof has ever been paid to Mt. Forest, the undisputed fee simple owner in actual possession of the land. (R. I-317)

The oil and sulphur were being extracted from the debtor's property at the rate of more than $6,000,000 a year, when your petitioner, Frank Fitzgerald, immediately upon his appointment as Trustee for the debtor, invoked the jurisdiction of the court appointing him, to preserve and safeguard the debtor's property by enjoining further depletion and exhaustion of its oil and sulphur resources, and to obtain an adjudication of the debtor's interest in the land and the oil and sulphur contained therein, so that a plan of reorganization for the debtor could be promptly effected.

The original petition of the Trustee was filed on August 15, 1938. (R. I-29-37) However, the hearing thereon was adjourned from time to time until the primary jurisdiction of the District Court over the reorganization pro-

ceedings was sustained by the Sixth Circut Court of Appeals and certiorari was denied by this Court. *In re Mt. Forest Fur Farms of America, Inc.*, 103 Fed. (2d) 69 (1939); 308 U. S. 583. Thereupon, an amended petition was filed by the Trustee and an order to show cause was issued by the District Court and duly served upon all of the respondents. (R. I-47-59)

Prior to the trial on the merits, the respondents filed various dilatory motions including motions to quash the service of summons, motions to dismiss for lack of jurisdiction, motions to refer the proceedings to the United States District Court in Louisiana, motions to have the United States Attorney General intervene, and motions to stay proceedings in the District Court in Detroit and to refer the case to the State Courts of Louisiana. (R.I-40-43; 60-180) The United States Attorney General refused to intervene and all the other motions were taken under advisement by the trial judge under Rule 12(d) of the Rules of Civil Procedure, and were all denied at the conclusion of the case. (R. I-366; 369; IV-1500-01)

Although the proceedings were "*summary*" in form and name, they were "*plenary*" in fact. Full formal pleadings were filed by each of the respondents. The trial lasted more than a month. All of the testimony was adduced through witnesses who were examined and cross-examined at length. Hundreds of written exhibits were offered. The record on appeal, of more than 2500 printed pages, shows that all of the respondents had a full and complete opportunity to present their case.

The trial court heard oral arguments lasting two days, printed briefs were filed, and all parties submitted pro-

posed findings of fact and conclusions of law. On June 17, 1940, the trial court handed down exhaustive findings of fact and conclusions of law covering every phase of the case, and holding in substance:

1. That the debtor was the fee simple owner and in actual possession of the land and minerals in controversy;

2. That Cockrell reserved unto himself only one-eighth of the minerals together with the power to lease said one-eighth;

3. That Mt. Forest owned the other seven-eighths of the minerals and that none of the respondents had either a lease to or any right or color of title to or possession of Mt. Forest's minerals. (R. I 305-335)

The judgment entered by the trial court was not in the nature of a summary judgment. It permitted the oil and sulphur company respondents to continue to extract oil and sulphur from the debtor's property on con dition that they account to the Trustee for the value of seven-eighths of the minerals so removed, less the cost of production and a reasonable profit thereon. (R. I-336-343)

From this judgment, the respondents appealed. The Circuit Court of Appeals dismissed the whole proceedings on the grounds that the *res* in controversy was not the land or the minerals contained therein, but a legal concept in the nature of a right to remove the minerals, that the debtor was not in possession of that *res*

at the time of the filing of the petition for reorganization, and hence, that the District Court did not have jurisdiction to hear and determine the controversy. In reaching this conclusion, the Court of Appeals denied jurisdiction upon an erroneous and unwarranted assumption of facts directly contrary to the Trial Court's findings, adduced after a complete hearing on the merits of the controversy.

Both the District Court and the Court of Appeals agreed that the Cockrell reservation contained "obvious ambiguity" and was the fundamental *casus belli* in the case. The District Court, after hearing all the testimony, resolved that ambiguity and found, as a fact, that none of the respondents had any color or right of title to or possession of the seven-eighths of the minerals owned by Mt. Forest. Yet, the Court of Appeals, without disturbing the lower court's findings or making any different findings, and without attempting to resolve the admitted ambiguity in the Cockrell reservation, erroneously concluded, directly contrary to the findings of the trial court, that the oil and sulphur company respondents were exercising possession of an alleged right to remove the disputed minerals under a lease emanating from Cockrell.

The important point is that the extent of Cockrell's power to lease involves the interpretation of the ambiguous reservation and is one of the ultimate issues to be determined. While refusing to pass upon the merits, the Court of Appeals presumed to deny jurisdiction upon an unwarranted assumption as to said ultimate issue, directly contrary to the trial court's findings which are binding upon said appellate court unless clearly erroneous.

The error of the Court of Appeals becomes even more grievous in view of the past history of the litigation involving Mt. Forest's mineral rights in the Plaquemines Parish property. In March, 1936, while the debtor was in state court receivership, suit was instituted by it against Cockrell and the oil and sulphur company respondents in the state court in Plaquemines Parish, Louisiana. All of the respondents immediately filed exceptions to the jurisdiction over their persons. Cockrell, who was a resident of Texas, subsequently withdrew his exceptions and filed a general appearance and an answer. The oil and sulphur company respondents, however, were still standing upon their jurisdictional exceptions at the time the petitioner was appointed trustee for the debtor in August, 1938. (R. IV-1959-91).

The Trustee, therefore, being stymied from proceeding in the Louisiana litigation, invoked the jurisdiction of the Bankruptcy Court in Detroit. Some nine months thereafter, in an effort to strengthen their attack on the jurisdiction of that Bankruptcy Court, the oil and sulphur companies withdrew their exceptions to the jurisdiction of the Plaquemines Parish court, which exceptions had prevented action therein for three years. (R. IV-1989). The Trustee, however, has never in in any way ratified, adopted or approved said Plaquemines Parish litigation and has never become a party thereto.

When at last the Trustee was able to corral all of the respondents into one proceeding, and for the first time was able to secure a trial on the merits and had secured a ruling in his favor thereon from the District Court, the Court of Appeals dismissed the entire proceeding upon narrow, technical, jurisdictional grounds and or-

dered the Trustee to proceed once more in some other jurisdiction. If the Trustee can not maintain the instant proceeding, then, the danger is that the shareholders of Mt. Forest may, for all practical purposes, be left remediless to determine and enforce their rights to one of the most valuable mineral tracts in the world, or at least, will be without an adequate forum where jurisdiction and venue exist over all the respondents.

OPINIONS BELOW

At the conclusion of taking proofs, the District Court orally denied all respondents' jurisdictional motions without opinion. (R. IV-1500-1501). On June 17, 1940, the trial court handed down exhaustive findings of fact and conclusions of law (the same being separately printed for the convenience of this Court) and a judgment was entered, based on said findings, on July 10, 1940. (R. I-305-335; 336-343). Separate findings of fact and conclusions of law and interlocutory injunctions were issued without opinion in the two ancillary proceedings on February 22, 1940, and November 10, 1940. (R. 1846-231, 232; R. 8894-105, 107).

The Sixth Circuit Court of Appeals in a written opinion handed down August 15, 1941, reversed the judgment of the District Court on the motions to dismiss the Trustee's proceedings, dismissed the Trustee's cross-appeal, and dissolved the injunctions in the two ancillary proceedings. (R. V-2523-46). The petitioners' petition for rehearing was denied on October 11, 1941, without written opinion. (R. V-2571). The decision of the Circuit Court of Appeals is reported in 122 Fed. (2d) 232.

JURISDICTION

The judgments of the Circuit Court of Appeals, to be reviewed, were entered August 15, 1941, and the order denying the petition for rehearing was entered October 11, 1941.

The jurisdiction of this court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925 (Title 28 U. S. C., Section 347).

STATUTES INVOLVED

Section 102 of Chapter X of the Bankruptcy Act, commonly known as the Chandler Act (Title 11 U. S. C., Sec. 502):

> "The provision of chapters I to VII, inclusive, of this Act shall, insofar as they are not inconsistent or in conflict with the provisions of this chapter, apply in proceedings under this chapter: *Provided, however,* That section 23 * * * shall not apply in such proceedings unless an order shall be entered directing that bankruptcy be proceeded with pursuant to the provisions of chapter I to VII, inclusive. * * * * "

Section 111 of Chapter X of the Chandler Act (Title 11 U. S. C., Sec. 511):

> "Where not inconsistent with the provisions of this chapter, the court in which a petition is filed shall, for the purposes of this chapter, have exclusive jurisdiction of the debtor and its property, wherever located."

Section 23 of the Bankruptcy Act (Title 11 U. S. C., Sec. 46):

> "a. The United States district courts shall have jurisdiction of all controversies at law and in equity, as distinguished from proceedings under this Act, between receivers and trustees as such and adverse claimants, concerning the property acquired or claimed by the receivers or trustees, in the same manner and to the same extent as though such proceeding had not been instituted and such controversies had been between the bankrupts and such adverse claimants."
>
> "b. Suits by the receiver and the trustee shall be brought or prosecuted only in the courts where the bankrupt might have brought or prosecuted them if proceedings under this Act had not been instituted, unless by consent of the defendant, except as provided in sections 60, 67, and 70 of this Act."

THE QUESTIONS PRESENTED

1. The fundamental legal question presented in this case relates to the extent of the jurisdiction of a District Court, sitting as a Court of Bankruptcy, in corporate reorganization proceedings, under Sections 102 and 111 of Chapter X of the Chandler Act, to enjoin interference with, and depletion or waste of, the bankrupt's property located outside of the territorial limits of the district, to determine the extent of the debtor's interest in said property, and to that end to send the necessary process of service throughout the United States.

2. Likewise involved is the important question of whether there has been a shift from "*possession*" to "*property interest*" in determining the jurisdiction of

the bankruptcy court over the property of the debtor in corporate reorganization proceedings under the above mentioned sections of the Chandler Act, as contrasted with straight bankruptcy.

3. With the elimination of the applicability of Section 23 of the Bankruptcy Act to corporate reorganization proocedings, the further question is presented of the right of the court in which the reorganization proceedings are pending to hear and determine controversies as against adverse claimants, when such a determination is a necessary prerequisite to effecting a plan of reorganization for the debtor, and to send its process outside of the district in order to obtain service upon such adverse claimants.

4. Finally, there is presented the question of the right of a Court of Appeals to refuse to pass upon the merits of the issues involved and to dismiss the proceeding for lack of jurisdiction, when, by the very nature of the case, jurisdiction can not be determined without first passing upon the merits, and when further, the jurisdictional decision of the Court of Appeals is grounded upon an erroneous assumption of the ultimate issues, directly contrary to the findings of fact of the trial court handed down after a complete hearing on the merits.

REASONS RELIED UPON FOR ALLOWANCE OF WRITS OF CERTIORARI.

The extent of the jurisdiction of a District Court, sitting as a Court of Bankruptcy in reorganization proceedings, over the debtor's property located outside the dis-

trict, and the extent of its power to protect such property by the issuance of process for service anywhere in the United States, are matters of special importance because:

1. This Court has not heretofore passed directly upon these questions. This Court has not had before it for construction and interpretation Sections 102 and 111 of the Chandler Act, and particularly it has not been called upon to determine the effect of eliminating the applicability of Section 23 to corporate reorganization proceedings.

2. The decision of the Sixth Circuit Court of Appeals in the instant case is in direct conflict with a decision of the Fourth Circuit Court of Appeals on the same subject, to wit, *Warder v. Brady*, 115 Fed. (2nd) 89 (1940). In the latter case the Fourth Circuit Court not only held that possession was not the test of jurisdiction of the bankruptcy court in corporation reorganizations, but in construing the elimination of the applicability of Section 23 to such proceedings said:

> "It seems clear that the bankruptcy court under Chapter X has jurisdiction to entertain all suits to which its trustee or the debtor in possession is a party, even though they be instituted against adverse claimants."

3. The decision of the Sixth Circuit Court of Appeals in the instant case is in conflict with applicable decisions of this Court, to wit, *Continental Illinois National Bank*

&Trust Co. v. Chicago, Rock Island & Pacific Railway Co., 294 U. S. 648 (1935) and *Thompson v. Magnolia Petroleum Co.*, 309 U. S. 478 (1940).

4. The questions involved are constantly arising in other reorganization proceedings throughout the land, and for the reasons above stated should be authoritatively settled by this Court.

5. The complete disregard by the Court of Appeals in the instant case of the findings of fact of the Trial Court constitutes a departure so far removed from the accepted and usual course of judicial proceedings, as specifically required under Rule 52 (a) of the Rules of Civil Procedure, as to call for an exercise of this Court's power of supervision.

WHEREFORE, your petitioners pray that writs of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Sixth Circuit, commanding that Court to certify and send to this Court for its review and determination, on a day certain to be named therein, a full and complete transcript of the record of the proceedings in cases numbers 8802-08, entitled on its docket "Gulf Refining Co. of Louisiana, et al., v. Frank Fitzgerald, Trustee"; and case number 8614 entitled on its docket "Ernest Cockrell, et al., v. Frank Fitzgerald, Trustee", and in case number 8894 entitled on its docket "Ernest Cockrell, et al, v. Frank Fitzgerald, Trustee, et al."; and that said judgments of the said Circuit Court of Appeals in said cases may be reversed by this Honorable

Court, and that your petitioners may have such other and further relief in the premises as to this Honorable Court may seem meet.

And your petitioners will ever pray.

ROBERT S. MARX,
FRANK E. WOOD,
EUGENE D. SAUNDERS,
ELDON S. LAZARUS,
ISAAC S. HELLER,
Attorneys for Petitioners.

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Petitioner,

v.

ERNEST COCKRELL, et al.,
Respondents.

FRANK FITZGERALD, Trustee for MT. FOREST FUR FARMS OF AMERICA, INC., et al.,
Petitioners,

v.

ERNEST COCKRELL, et al.,
Respondents.

BRIEF IN SUPPORT OF PETITION FOR WRITS OF CERTIORARI

I.

OPINIONS BELOW

Opinions below have been described in the petition for writs of certiorari under the caption "Opinions Below".

II.

JURISDICTION

The statement as to jurisdiction has heretofore been set forth in the petition for writs of certiorari under the caption "Jurisdiction".

III.

STATEMENT OF THE CASE

The facts have been adequately stated in the petition for writs of certiorari under the caption "Summary Statement."

IV.

SPECIFICATIONS OF ERROR

1) The Circuit Court of Appeals erred in reversing and in not affirming the decision of the District Court which denied respondents' motions to dismiss the proceedings for lack of jurisdiction.

2) The Circuit Court of Appeals erred in holding that possession alone, and not property interest, is the test of jurisdiction in corporate reorganization proceedings brought under Chapter X of the Bankruptcy Act.

3) The Circuit Court of Appeals erred in holding that the bankruptcy court in which corporate reorganization proceedings are pending did not have power to issue process outside of its district as against adverse claimants.

4) The Circuit Court of Appeals erred in holding that the *res* in controversy was not the land containing the minerals, but was a legal concept in the nature of a right to remove minerals; and that the trustee, one of the petitioners herein, was not in possession of the *res*, even though he was in possession of the land containing the minerals, and held the undisputed title to said lands.

5) The Circuit Court of Appeals erred in disregard-

ing the Trial Court's findings of fact, without in any manner undertaking to assail the correctness thereof.

6) The Circuit Court of Appeals erred in not affirming the decision of the District Court on the merits of the controversy.

V.

SUMMARY OF ARGUMENT

A) The test of jurisdiction in corporate reorganization proceedings under the Chandler Act is the property interest of the debtor in, and not its possession of, the res in controversy.

B) There is no substantial difference between a summary and a plenary proceeding where comprehensive pleadings are filed and a complete trial on all issues is had by all parties.

C) A bankruptcy court in corporate reorganization proceedings under the Chandler Act has the power to issue process outside of its district as against adverse claimants.

D) Arguendo, if possession be the test of such jurisdiction, then under the decisions of this Court, the debtor was in possession of the res in controversy.

E) Findings of fact of a trial court are binding upon the appellate court unless clearly erroneous and may not be ignored or disregarded by such appellate court.

F) The questions involved are of vital importance to some 3500 shareholders of the debtor who have been attempting for many years to obtain an adjudication of their rights in one of the most valuable mineral tracts in the world, and said shareholders may be without an adequate forum where jurisdiction and venue exist over all the respondents, if not permitted to proceed herein.

VI.
ARGUMENT

A
THE TEST OF JURISDICTION OF THE BANKRUPTCY COURT OVER THE PROPERTY OF THE DEBTOR IN CORPORATE REORGANIZATION UNDER THE CHANDLER ACT IS PROPERTY INTEREST AND NOT POSSESSION

The petitioners submit that, contrary to the rule in straight bankruptcy or equity receivership proceedings, the test of jurisdiction of the bankruptcy court over the property of the debtor in corporate reorganization under the Chandler Act is *property interest* and not *possession*. The petitioners submit that particularly in writing Sections 102 and 111 into Chapter X of the Bankruptcy Act, Congress definitely enhanced and enlarged the jurisdiction of the bankruptcy court in corporate reorganization over that in ordinary bankruptcy and shifted the emphasis from "possession" to "property".

Section 111 provides that:

> "Where not inconsistent with the provisions of this Chapter, the court in which a petition is filed shall, for the purposes of this Chapter, have exclusive jurisdiction of the debtor and its property wherever located."

Section 102, *inter alia*, provides that Section 23 of the old Bankruptcy Act is inapplicable to corporate reorganization proceedings.

Section 23 provides as follows:

> "The United States district courts shall have jurisdiction of all controversies at law and in equity, as distinguished from proceedings under this Act, between receivers and trustees as such

and adverse claimants, concerning the property acquired or claimed by the receivers or trustees, in the same manner and to the same extent as though such proceedings had not been instituted and such controversies had been between the bankrupts and such adverse claimants.

Suits by the receiver and the trustee shall be brought or prosecuted only in the courts where the bankrupt might have brought or prosecuted them if proceedings under this Act had not been instituted, unless by consent of the defendant, except as provided in sections 60, 67, and 70 of this Act."

Sections 60, 67 and 70 thus referred to in Section 23b, *supra*, relate to unlawful preferences, liens and fraudulent transfers. It is the established rule in straight bankruptcy proceedings that under Section 23 the trustee may bring suit in the bankruptcy court without respect to the citizenship of the bankrupt, the amount in controversy, *et cetera*, only in the above instances. Section 23 requires that in all other proceedings in straight bankruptcy against adverse claimants, the trustee may not bring suit in any jurisdiction unless the bankrupt could have done so. See Finletter's *The Law of Bankruptcy Reorganization*, pp. 179-180 (1939).

Section 77B of the Bankruptcy Act, in Sub-section k, enumerated certain sections of the regular Bankruptcy Act which were inapplicable to corporation reorganization, but it made no mention of Section 23.

Considerable confusion arose both in the lower federal courts and among text writers as to whether or not Section 23 was applicable to corporate reorganizations under

Section 77B of the Bankruptcy Act, * but that confusion was eliminated by Section 102 of the Chandler Act specifically declaring Section 23 inapplicable to Chapter X proceedings.

It is thus apparent that by virtue of the elimination of the applicability of Section 23, Congress has given to the court, conducting the reorganization proceedings, jurisdiction over independent actions to recover property in the hands of adverse claimants, when such actions are necessary to effect the debtor's reorganization. Construing Sections 102 and 111 of the Chandler Act, petitioners submit that it was clearly the intention of Congress thereunder to give to the bankruptcy court, in which the reorganization proceedings are pending, jurisdiction over the debtor's property wherever located without regard to who may be in possession thereof, that such jurisdiction is given for the purpose of expediting the reorganization of the debtor, and that the trustee, in pursuing said property, is not subjected to those jurisdictional limitations imposed by Section 23 in an ordinary bankruptcy proceeding.

The reasons for thus extending the jurisdiction of the bankruptcy court in corporate reorganization are obvious. In ordinary bankruptcy proceedings, liquidation is the sole objective, and neither the venue nor the jurisdiction of a particular dispute is of any ultimate significance. It is of vital importance, however, in corporation reorganization, where rehabilitation of the debtor is the objective, that the court which is responsible for effecting a reorganization shall have control over all of the prop-

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* The Law of Bankruptcy Reorganization—Finletter, Page 179-180 (1939).
49 Harvard Law Review 1147.
In re Standard Gas & Electric Company, 119 Fed. (2d) 658, 662-63 (C. C. A. 3, 1941).
See also statement of John Gerdes before the sub-committee of the Committee on the Judiciary of the United States Senate; 75th Congress, Second Session, H.R. 8046, January 19, 1938, at page 77.

erty of the debtor in whosever hands the same may be and wherever situated.

Both this Court and able text writers have recognized the necessity for this distinction between corporate reorganization and ordinary bankruptcy. Although concerned with Section 77 of the Bankruptcy Act, relating to railroad reorganization, this Court gave expression to the spirit of corporate rehabilitation in the case of *Continental Illinois National Bank & Trust Co. v. Chicago, Rock Island & Pacific Ry. Co.*, 294 U. S. 648 (1935). Mr. Justice Sutherland stated on page 676 thereof:

> "It may be that in ordinary bankruptcy proceeding the issue of an injunction in the circumstances here presented would not be sustained. As to that it is not necessary to express an opinion. But a proceeding under Section 77 is not an ordinary proceeding in bankruptcy. It is a special proceeding which seeks only to bring about a reorganization, if a satisfactory plan to that end can be devised. And to prevent the attainment of that object is to defeat the very end the accomplishment of which was the sole aim of the section, and thereby to render its provisions futile."

In a recent article appearing in the Harvard Law Review, (Volume 49, page 1131) the decision of this Court in the case above cited is commented upon and the same distinction between ordinary bankruptcy and corporate reorganization is recognized in the following excerpt:

> "With the shift in the jurisdictional basis from *possession to 'property'*, case law must define the extent of the debtor's interest in a *res* that is necessary to subject it to the reorganization court's jurisdiction. Of course, property of the debtor in-

> cludes bankruptcy concepts, but the question of whether the reorganization court's jurisdiction extends beyond prior bankruptcy limits was presented to the Supreme Court in *Continental Illinois National Bank & Trust Co. v. Chicago, R. I. & Pac. Ry.* * * * The Court by sustaining the injunction assumed that the bankruptcy requirement of possession was unnecessary under Section 77 and held that the debtor's equity in the securities was sufficient property under subdivision (a) to confer jurisdiction on the reorganization court."

Another well known text writer on corporate reorganization, Thomas K. Finletter, in his work on *The Law of Bankruptcy Reorganization* (1939), thus states his concept of the problem on pages 145-147 thereof:

> "The reorganization court, except under Chapter XI, thus has a wider jurisdiction than either of its predecessors, both in the extent of the property over which it has dominion, and the amount of control which it may exercise over that property. * * * The full jurisdiction of the reorganization court accordingly extends not only to property in the possession of the debtor but also to pledged assets or property in the possession of a mortgagee or other secured creditor. By this extension of its scope, the power of the reorganization court is freed of the in personam limitations of the equity and ordinary bankruptcy courts and approaches a jurisdiction in rem."

See also Gerdes on *Corporate Reorganizations*, Vol. 2, pp. 1368, 1383.

While this court has passed upon the jurisdiction of the bankruptcy court over the property of a debtor in railroad reorganizations, *Continental Illinois National Bank & Trust Co. v. Chicago, Rock Island & Pacific Ry. Co.*, supra, and *Thompson v. Magnolia Petroleum Co.*, 309 U. S. 478 (1940), it has never passed upon the extent or the limitations of the jurisdiction of the bankruptcy court over the debtor's property in corporate reorganizations under Chapter X of the Chandler Act, and particularly has it not considered Section 111 in conjunction with Section 102 of the Act, making Section 23 of the Bankruptcy Act inapplicable. Because of the pressing importance of this problem, not only in the instant reorganization, but in similar proceedings throughout the United States, this Court should grant certiorari and determine this issue.

With the exception of the court below, only one other appellate court has passed upon this problem. While the Sixth Circuit, in the instant case, denied that Sections 111 and 102 enlarged the jurisdiction of the bankruptcy court in corporate reorganizations as above submitted (R. V-2533-34), the Fourth Circuit Court of Appeals, in the recent case of *Warder v. Brady*, 115 Fed. (2d) 89 (1940), although refusing to accept jurisdiction on the particular facts presented to it, diametrically differed with the court below in its construction and interpretation of Sections 102 and 111 of the Chandler Act. Petitioners, therefore, submit that this court should grant *certiorari* for the purpose of resolving this conflict between the Fourth and Sixth Circuits.

In *Warder v. Brady, supra*, the court was concerned with a simple turn-over order directing the respondent to pay money to the trustee, and under these facts, it re-

jected summary jurisdiction. However, in reviewing the meaning and history of the new sections of the Chandler Act, the court recognized the shift in emphasis from "possession" to "property" in the following language:

> "These cases relating to ordinary bankruptcy procedure, and are not conclusive here. The bankruptcy court in reorganization proceedings under Section 77B, 11 U.S.C.A. Section 207, had, and under Ch. X of the 1938 Act now has a wider control, that comprehends not only property of the debtor in his actual or constructive possession, but also property of the debtor in the hands of lien holders. The formulation of a plan of reorganization contemplates a readjustment of secured as well as unsecured debts, **and so the summary power of the court extends to all of the debtor's property that can be affected by a plan, whether or not the property is in his possession."**

Even more significant than this, the court held, as contended for by the petitioners herein, that, with the elimination of Section 23, by virtue of Section 102 of the Chandler Act, the court, in which the corporate reorganization proceedings are pending, has the right to hear and determine a controversy as to property even as against adverse claimants. On page 94 of its opinion, the court thus stated:

> "Heretofore, the dependent jurisdiction of the courts of bankruptcy was restricted by Section 23 and by the rule of comity, but now that Sec. 23 is no longer applicable to reorganization proceedings under Ch. X, and the power to interfere in a prior proceeding has been conferred upon the bankruptcy court by Congress in the exercise of the bankruptcy power, **it seems clear that the bankruptcy**

court under Ch. X has jurisdiction to entertain all suits to which its trustee or the debtor in possession is a party, even though they be instituted against adverse claimants."

A brief reference to the history of the Chandler Act may be instructive. Because of the technical nature of the bill, there was limited discussion of individual sections of the Chandler Act in either the Senate or the House of Representatives at the time the Act was passed.* A careful reading of the hearings before the Judiciary Committees of both the Senate and the House, however, clearly reveals that it was the intention of the framers of the Act to extend and enhance the jurisdiction of a bankruptcy court in corporate reorganization over that in ordinary bankruptcy or equity receivership cases.

As one indication of that intention, we refer to statements made during the hearing before the Committee on the Judiciary of the House of Representatives for the Seventy-fifth Congress, First Session, on the Chandler Act. On pages 241 and 242 thereof, there appears a colloquy between the Honorable Walter Chandler, representative in Congress from the State of Tennessee, and Mr. Jacob I. Weinstein, member of the National Bankruptcy Conference. Even though that colloquy took

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* Congressional Record, Vol. 81, Part 8, 75th Congress, First Session, House of Representatives, H.R. 8046, at Pages 8645, 8648, 8649;

Congressional Record, Vol. 83, Part 8, 75th Congress, Third Session, Senate, Pages 8680, 8682.

Congressional Record, Vol. 83, Part 8, 75th Congress, Third Session, House of Representatives, Page 9106.

Typical is the statement of Congressman Michener, Page 8648, *supra:*

> "Mr. Chairman, I am not going to take any time explaining this bill. It is technical and no superficial explanation will be helpful. The gentleman from Tennessee (Mr. Chandler) has stated the objectives and it would take several hours to discuss all of the bill's provisions. * * *"

place before Section 102 was amended in its present form, it clearly demonstrates that the objections, as voiced by the respondents herein to extending jurisdiction of the court in which reorganization proceedings are pending, were considered by Congress and were rejected. As expressed therein, Congress deemed it preferable to require a citizen of Texas to come to Detroit to contest, in the reorganization court in Detroit, title to property located in Texas, than to go back to the old idea of ancillary receiverships and litigation throughout the country.

The word *"property"* as written into Section 111 is at best difficult of definition. Petitioners submit that it is important that this Court grant certiorari for the purpose of defining said term as used in the Chandler Act, and for the purpose of establishing the extent of and the limitations on the bankruptcy court's jurisdiction over the property of the debtor being reorganized. There is no decision of this Court bearing thereon, and the only two Circuits which have directly passed upon Sections 102 and 111 are in conflict as to the interpretation thereof.

B.

THERE IS NO SUBSTANTIAL DIFFERENCE BETWEEN A SUMMARY AND PLENARY PROCEEDING WHERE COMPREHENSIVE PLEADINGS ARE FILED AND A COMPLETE TRIAL ON ALL ISSUES IS HAD BY ALL PARTIES.

In the preceding section, we have argued that the Chandler Act has extended and enhanced the jurisdiction of the bankruptcy court over the property of the debtor before it in corporate reorganization, *inter alia*, by shifting the emphasis from *possession by* to *property interest of* the debtor. The next problem that logically arises

concerns itself with the method of exercising that jurisdiction, and largely resolves itself into whether the bankruptcy court, in which the reorganization proceedings are pending, shall proceed by way of plenary or summary proceedings.

The difference between summary and plenary proceedings is solely one of degree. Usually the former is started by petition and the necessary parties are cited into court by orders to show cause, whereas in the latter, the proceedings are begun by complaint and a summons brings in the parties. See *Finletter, The Law of Bankruptcy Reorganization*, page 156 (1939).

Some doubt has been expressed by lower courts and by text writers as to whether the enhanced jurisdiction of the bankruptcy court in corporate reorganization extends to summary as well as to plenary proceedings. Some have expressed the thought that *possession* is still the test of summary proceedings even under Sections 102 and 111 of the Chandler Act. However, insofar as the instant case is concerned, we submit that the distinction between summary and plenary proceedings is immaterial and that we are solely concerned with the primary problem of the extent of the bankruptcy court's jurisdiction over the property of the debtor wherever located.

It is well established law that the distinction between plenary and summary proceedings is purely procedural, or, as stated above, solely a matter of degree. Where comprehensive pleadings are filed and a full hearing and a complete trial is had by all parties, there is, in effect, no valid distinction between summary and plenary proceedings. See *Harris v. Avery Brundage Co.*, 305 U. S. 160, 164 (1938).

In the instant case, the record speaks for itself. Not only were a number of long, dilatory and jurisdictional motions filed by the respondents, but the corporate respondents filed an answer, which in its reduced form in the printed record, covers nearly 40 pages (R. I-143-180). Over a month was consumed in the actual trial of the case with both the Trustee and the respondents calling numerous witnesses, offering many depositions, as well as literally hundreds of written and printed exhibits. At the conclusion thereof, oral arguments were heard lasting two full days, printed briefs were filed, and proposed findings of fact and conclusions of law were submitted by counsel for all parties concerned.

Under these facts, we believe the distinction between summary and plenary proceedings vanishes. We cite the very apposite language of the Eighth Circuit Court of Appeals in the case of *Central Republic Bank & Trust Co. v. Caldwell*, 58 Fed. (2d) 721 at 732 (1932), where the court stated:

> "In the instant case, although formal pleadings were not filed by all the parties interested, yet the issue presented by the intervening petition was clear-cut and fully understood by the parties. There is no complaint as to this. The interveners on the one hand, and the bankruptcy receiver and the petitioning creditors on the other, presented their evidence in open court. There is no complaint by interveners that they did not have full opportunity to introduce their evidence and present their arguments to the court. Briefs were furnished after the hearing. All of the earmarks of a full and complete hearing are shown by the record. *Under such circumstances, the proceeding was in substance and effect a plenary suit.*"

To the same effect, see also *Board of Trade of City of Chicago v. Johnson*, 283 Fed. 374, 380 (C.C.A. 7, 1922) (Reversed on other grounds, 264 U.S. 1); *In re Rockford Produce & Sales Co.* 275 Fed. 811 (C. C. A. 7, 1921); *Clements v. Conyers*, 31 Fed. (2d) 563 (C.C.A. 7, 1928).

Respondents argued below that inasmuch as the Trustee had formally labeled his petition as "Summary", he could not be heard to say that the proceeding was not "Summary". Such is not our position. We do not deny that our proceeding was labeled "Summary", but we do insist that in substance it was no different than if we had called the proceeding "Plenary", since there were complete pleadings filed and a full trial had by all parties. The petitioners, therefore, reiterate that it is immaterial, insofar as determining the court's jurisdiction in the instant proceedings, whether the Trustee's proceedings be styled "Summary" or "Plenary".

C.

A BANKRUPTCY COURT IN CORPORATE REORGANIZATION PROCEEDINGS UNDER THE CHANDLER ACT HAS THE POWER TO ISSUE PROCESS OUTSIDE OF ITS DISTRICT AS AGAINST ADVERSE CLAIMANTS.

A corollary problem, also open and undecided by this Court, which arises in conjunction therewith, relates to the power of the bankruptcy court in which the reorganization proceedings are pending to issue process outside of its district. For purposes of this discussion, petitioners submit that it matters not, in this particular instance, whether the proceedings be called "summary" or "plenary", since, as set forth immediately hereinabove all parties had a full hearing on all issues involved.

The problem of extra-territorial service of process is implicit in Sections 102 and 111 of the Chandler Act. It is well established that one of the fundamental purposes of corporate reorganization was to avoid the difficulties of equity receiverships with the attendant evil of ancillary proceedings.* One of the obvious purposes of the Chandler Act was to concentrate, in the hands of one court responsible for the rehabilitation and reorganization of a debtor doing business through the county, all of the debtor's assets and property wherever located. It logically follows that if the court in charge of the reorganization is to have control of the debtor's property wherever located, it must necessarily have the power to issue process with respect to exercising its control over that property.†

The argument in favor of extra-territorial process in corporate reorganization is further strengthened by Section 102 of the Chandler Act. With the elimination of Section 23 from corporate reorganizations under the Chandler Act, petitioners submit that there is implied by necessity the right of the bankruptcy court to issue process throughout the United States to protect and preserve the property of the debtor wherever located. This Court upheld the right of the bankruptcy court under the Railroad Reorganization Act to issue extra-territorial injunctive process in the case of *Continental Illinois*

* Hearing before the Committee on the Judiciary of the House of Representatives; 75th Congress, First Session on H.R. 8046, June 1-9, 1937, pages 4, 21, 24, 213, 277, 293.

† 5 *University of Chicago Law Review 139* (1938):

> "Courts and writers alike have suggested that a reorganization court should have extra-territorial jurisdiction to facilitate the reorganization and the management of the corporate business. It has been held that the jurisdiction of the reorganization court is nationwide over tangible property to which the debtor claims title."

Nat'l. Bank & Trust Co. v. Chicago, Rock Island & Pacific Ry. Co., supra. While it is true that Section 77(a) authorized the issuance of process outside the district, we believe the reasoning of this Court therein is sufficiently broad to cover the instant case. In that case, this Court stated:

> "* * * Jurisdiction over the property wherever located carries with it jurisdiction to enjoin, in a proper case, interferences with the property, and this includes by necessary inference, the power to send process to that end for service upon the persons to be enjoined wherever they may be found within the United States."

Here again, however, we have no authoritative decision of this Court determining this important problem with respect to proceedings under Chapter X of the Chandler Act. Insofar as the federal appellate decisions are concerned, we find a wide-open split and a conflict therein. In such cases as *In re Greyling Realty Corp.*, 74 Fed. (2d) 734 (1935), and *In re Prudence Bonds Corp.*, 75 Fed. (2d) 262 (1935), the Second Circuit upheld the right of the bankruptcy court in reorganization proceedings to issue process outside the district. Contra-decisions are to be found in the cases of: *U. S. v. Tacoma Oriental S. S. Co.*, 86 Fed. (2d) 363 (1936), decided by the Ninth Circuit Court of Appeals; *Bovay v. H. M. Byllesby & Co.*, 88 (2d) 990 (1937), decided by the Fifth Circuit Court of Appeals; *In re Prima Co.*, 98 Fed. (2d) 952 (1938), decided by the Seventh Circuit Court of Appeals; and *In re Standard Gas & Electric Co., supra*, decided by the Third Circuit.

The court below held with the latter decisions. The petitioners submit that this Court should grant *certiorari*

for the purpose of determining the conflict between the Circuits and of settling this important problem in corporate reorganization.

D.

ARGUENDO, IF POSSESSION IS THE TEST OF JURISDICTION, THEN UNDER THE DECISIONS OF THIS COURT THE DEBTOR WAS IN POSSESSION OF THE RES IN CONTROVERSY

It is well established that under the old bankruptcy rule the bankruptcy court has the power to hear and determine a controversy as to property in the possession of the bankrupt at the time of the filing of the bankruptcy petition. It has been further established by this Court that said possession may be either actual or constructive and that such jurisdiction includes the right to adjudicate all claims, adverse or otherwise, to said property, including questions of title. See *Taubel-Scott-Kitzmiller Co., v. Fox*, 264 U. S. 426 (1924); *Isaacs v. Hobbs Tie & Timber Co.*, 282 U. S. 734 (1931); *Ex parte Baldwin*, 291 U. S. 610 (1934).

In the immediately preceding portion of this brief petitioners have argued that under the Chandler Act, contrary to orthodox bankruptcy procedure, *property interest* and not *possession* is the test of jurisdiction over the debtor's property. Assuming for the sake of argument, however, that possession is the test of such jurisdiction, then we submit that in the instant case the debtor has met this condition and is in possession of the *res* in controversy, as heretofore defined by this Court.

The petitioners submit that the ruling of this Court in the recent case of *Thompson v. Magnolia Petroleum Co.*, 309 U. S. 478 (1940), is controlling as to jurisdiction in the

instant case, if possession is the proper test therefor. The facts presented in the *Magnolia* case are substantially identical with those in the instant case, except for the differences of names and places. In essence, this Court concluded therein that possession of the surface of the land by the debtor in reorganization was sufficient to support the bankruptcy court's jurisdiction to determine the character of the debtor's title thereto, as against the respondent oil companies, who denied the trustee's title beyond a mere easement to use the surface for railroad purposes. The respondent oil companies were actually exercising and developing mineral rights under a lease granted by someone other than the debtor or its trustee and covering a single tract of land, including that claimed by the trustee.

It is undenied that Mt. Forest owns the land in question and that it is in possession of the surface thereof. Similarly, as in the *Magnolia* case, the corporate respondents herein are actually extracting minerals from a tract of land—to which, in this case the debtor asserts title to all, and in the *Magnolia* case, the debtor asserted title to a part—under a lease granted by some third party other than the debtor or its Trustee, and are denying the trustee's title to the lands beyond the right to use the surface thereof.

The respondents below advanced the metaphysical theory that the *Magnolia* case did not apply because the *res* in controversy in the instant case is not the land containing the minerals, as contended for by the petitioners, but is the intangible, incorporeal right to remove the minerals, which right, it is claimed, is possessed by the corporate respondents through the exercise thereof by conducting mineral operations on the land.

Petitioners submit that this Court has clearly indicated, in such decisions as the *Magnolia* case, *supra*, and *Warren v. Palmer*, 310 U. S. 132 (1940), that in corporate reorganizations it is concerned with realistic and not fictitious possession.

Mt. Forest owns the unquestioned title to, and is in possession of, 52,000 acres of land in Plaquemines Parish, Louisiana. Surely this is sufficient possession to give the bankruptcy court, seeking to reorganize Mt. Forest, jurisdiction to determine the debtor's interest in the minerals contained in this tract of land.

Petitioners, therefore, submit that the Court of Appeals erred in refusing to follow the decision of this Court in the *Magnolia* case and that this Court should grant *certiorari* for the purpose of reversing the decision of the court below with respect thereto.

E.

FINDINGS OF FACT OF A TRIAL COURT ARE BINDING UPON THE APPELLATE COURT UNLESS CLEARLY ERRONEOUS AND MAY NOT BE IGNORED OR DISREGARDED BY SAID APPELLATE COURT.

As petitioners argued both before the Trial Court and the Court of Appeals, the jurisdictional issues are so inextricably involved with the merits that it is impossible to determine jurisdiction without a full and complete hearing on the merits. Able text writers have pointed out that this is not unusual in such proceedings. See 40 *Columbia Law Review* 489-91.

The Trial Court, having the perspicacity to grasp the situation, took respondents' motions to dismiss for lack

of jurisdiction under advisement under Rule 12(d) of the Federal Rules of Civil Procedure and did not pass upon said motions until after the conclusion of the proofs. It fully realized that it could not determine who was in possession of the minerals in dispute until it had heard all of the evidence, had resolved the ambiguity in the reservation in question, and had determined therefrom both the extent of mineral interest owned respectively by Mt. Forest and Cockrell and the extent of the mineral interest leased by Cockrell to the oil and sulphur companies.

Having taken all the proofs, the Trial Court, *inter alia*, found the following facts:

> "It was the clear intention of the parties in making the deed of April 11, 1927, that Ernest Cockrell should reserve and he did, in fact, reserve unto himself only one-eighth of 127/150ths of the minerals.
>
> "It was likewise the intention of the parties in making the deed of April 11, 1927, that Ernest Cockrell should reserve and he did, in fact, reserve unto himself the exclusive right to make a lease for the exploration and development only of said one-eighth of 127/150ths of the minerals reserved by him.
>
> "The Gulf Refining Company of Louisiana and all corporate respondents claiming under it hold a lease from Ernest Cockrell covering his one-eighth of 127/150ths of the minerals in or under the property of Debtor but none of the corporate respondents holds a lease covering the remaining seven-eighths of 127/150ths of the minerals in or under said property, which belongs to Debtor." (R. I-318-319)

Having thus resolved the ambiguity in the reservation before it, and having concluded that the corporate respondents had neither color or right of title to Mt. Forest's interest in the minerals, the Trial Court concluded that Mt. Forest was in possession of the *res* in controversy.

The Court of Appeals, on the other hand, reversed the Trial Court and ordered the Trustee's proceedings dismissed for lack of jurisdiction, without passing upon the merits. It adopted the Trial Court's finding of fact that the Cockrell reservation was ambiguous, but having gone thus far, it ignored the Trial Court's resolution of that ambiguity. The Trial Court found, after a review of all the evidence, that the oil and sulphur companies had no lease and not even any color or right of title to or possession of Mt. Forest's 7/8ths of the minerals. Totally disregarding these findings of fact, which it did not disturb or criticize, the Court of Appeals held the reorganization court to be without jurisdiction, because the oil and sulphur companies were in possession under a lease emanating from Cockrell.

Petitioners do not deny that Cockrell had a right to make a lease to Gulf. But the whole controversy, involving untold millions of dollars, is "What could Cockrell lease?". Assuredly, Gulf has a lease, but the ultimate issue to be determined is the extent of that lease and the minerals covered thereby. *The Trial Court found as a fact that the lease covered only Cockrell's 1/8th of the minerals, and that the corporate respondents had no lease nor even color of title to Mt. Forest's 7/8ths of the minerals.*

That fact was totally disregarded by the Court of Appeals. We submit that it is impossible to decide the jurisdictional issue as to whether the oil and sulphur companies have either possession of or color of title to the minerals in dispute, until the ultimate issue of fact has been determined as to what mineral interest Cockrell leased to Gulf. That question cannot be answered until there has been a complete determination of the merits of the case, and until the "obvious ambiguity" in the reservation has been resolved. This Court has held in numerous decisions that mere forcible possession by an adverse claimant, without color of right, is not sufficient to oust the bankruptcy court of jurisdiction. See *Harrison v. Chamberlin*, 271 U. S. 191 (1926).

We submit that under the well-established law, findings of fact of a trial court are binding upon the appellate court unless found to be clearly erroneous. *State Farm Mutual Automobile Insurance Co. v. Coughran*, 303 U. S. 485 (1938); *Lauf v. E. G. Shinner & Co.*, 303 U. S. 323 (1938); *Law v. United States*, 266 U. S. 494 (1925). Where, as here, the appellate court does not conclude that said findings are erroneous, it cannot deny jurisdiction upon an assumption of fact directly contrary to the findings of fact of the trial judge. The Court of Appeals pitched its jurisdictional decision upon the sole ground that the oil and sulphur companies were in possession under a lease given by Cockrell by virtue of his power to lease contained in the reservation in dispute. That erroneous fact hypothesis cannot stand against the Trial Court's finding of fact, based upon a consideration of all the evidence before it, that none of the oil and sulphur companies had either a lease or any color or right of title to the 7/8ths of the minerals which were owned by Mt. Forest.

F.

THE QUESTIONS INVOLVED ARE OF VITAL IMPORTANCE TO 3500 SHAREHOLDERS OF THE DEBTOR WHO HAVE BEEN ATTEMPTING FOR MANY YEARS TO OBTAIN AN ADJUDICATION OF THEIR RIGHTS TO ONE OF THE MOST VALUABLE MINERAL TRACTS IN THE WORLD, AND SAID SHAREHOLDERS MAY BE LEFT REMEDILESS IF NOT ENTITLED TO PROCEED HERE

It would be difficult to conjure up a set of facts and circumstances which would more cogently demonstrate the necessity for the interpretation of the Chandler Act contended for by the petitioners than is here presented. For many years, Mt. Forest and its shareholders have sought an adjudication on the merits of the debtor's interest in the minerals in Plaquemines Parish, Louisiana. Whenever, in the past, Mt. Forest has sought to corner the oil and sulphur companies in any one jurisdiction, said companies have immediately expressed a preference for trying the case somewhere else, and have made use of every technical device of which they could conceive, to contest the jurisdiction of the particular court before which they were haled.

Suit was started against all the respondents by Mt. Forest in the local court in Plaquemines Parish, Louisiana, in 1936. Immediately, all of the corporate respondents filed exceptions to the jurisdiction. Subsequently, when the Trustee filed his first petition for summary relief against the respondents in the District Court in Detroit, exceptions were filed to that jurisdiction by the oil and sulphur companies. So, at one and the same time,

the corporate respondents were objecting both to the jurisdiction of the State Courts of Louisiana and to that of the Federal Court in Detroit, where the reorganization proceedings of the debtor were pending. The corporate respondents subsequently waived their jurisdictional exceptions in the Plaquemines Parish suit for the obvious purpose of strengthening their case against jurisdiction in the Federal Courts, but the Trustee for Mt. Forest has never adopted, ratified, or in any way taken over the State Court litigation in Louisiana.

Because of the diversity of citizenship and residence of the several respondents, the shareholders of Mt. Forest may be left remediless unless the bankruptcy court, in which the reorganization proceedings are pending, has jurisdiction to determine, as against all the respondents, this controversy on its merits, and has the power to issue its process wherever necessary to bring the respondents into court and to enjoin further depletion of the debtor's property, pending the determination of that controversy.

We submit, in conclusion, that this is precisely the type of situation which the Chandler Act seeks to correct. The debtor cannot possibly be reorganized until the extent of its interest in the minerals in Louisiana is first determined. If the court responsible for the reorganization of Mt. Forest has not the power to hear and determine that dispute, the debtor can never be reorganized.

It is, therefore, respectfully submitted that writs of certiorari should be granted.

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(21)

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1941

No. 763-771

IN THE MATTER OF

MT. FOREST FUR FARMS OF AMERICA, INC.,
a Delaware Corporation,
Debtor.

FRANK FITZGERALD, Trustee for MT. FOREST FUR FARMS OF AMERICA, INC., *Petitioner*,
v.
GULF REFINING COMPANY OF LOUISIANA, et al., *Respondents.*

FRANK FITZGERALD, Trustee for MT. FOREST FUR FARMS OF AMERICA, INC., *Petitioner*,
v.
GULF REFINING COMPANY OF LOUISIANA, et al., *Respondents.*

FRANK FITZGERALD, Trustee for MT. FOREST FUR FARMS OF AMERICA, INC., *Petitioner*,
v.
ERNEST COCKRELL, et al., *Respondents.*

FRANK FITZGERALD, Trustee for MT. FOREST FUR FARMS OF AMERICA, INC., et al., *Petitioners*,
v.
ERNEST COCKRELL, et al., *Respondents.*

DISTRICT COURT'S FINDINGS OF FACT AND CONCLUSIONS OF LAW

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EUGENE D. SAUNDERS,
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FOREWORD

The District Court handed down comprehensive findings of fact and conclusions of law. (R. I-305-335; 347-349). In order to assist this Court in its examination of the extensive record before it, we are setting forth herein those findings.

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DISTRICT COURT'S FINDINGS OF FACT AND CONCLUSIONS OF LAW

FINDINGS OF FACT

I. The Debtor, a Delaware corporation, owns the title to a tract of land located in the State of Louisiana upon which was discovered very rich deposits of oil and

sulphur. On March 5, 1930, suit was started in the Circuit Court for the County of Wayne, State of Michigan, by certain stockholders and an injunction was issued by the state court on March 30, 1930, limiting the rights of the officers of the corporation to continue its business. On August 31, 1931, a Receiver was appointed by the Michigan court, and this Receiver continued in possession of the premises and continued to operate the fur ranching business thereon which was conducted by the company prior to his appointment. He continued to do so from the date of his appointment until August 15, 1938. On August 15, 1938, this Court approved a petition for reorganization in accordance with the provisions of Section 77-B of the National Bankruptcy Act, as amended, and Frank Fitzgerald, the petitioner herein, was duly appointed and qualified as Permanent Trustee of the Debtor corporation and immediately went into possession. An appeal from this decision was taken to the Circuit Court of Appeals and the order approving the petition and appointing the Trustee was affirmed on April 5, 1939. See In Re Mount Forest Fur Farms of America, Inc., 103 Fed. (2), 69 (Certiorari denied 308 U. S. 583). During the time that the state Court Receiver had the custody of the property herein involved the respondents herein started to remove sulphur and oil from the premises, and continued to do so after the appointment of the Trustee by this Court.

The Trustee deemed it necessary, in order to protect the interests of the estate, that the respondents herein be required to show cause why they should not either discontinue their operations or account to him for the

proceeds of the soil and sulphur removed. On the return of this order to show cause all of the parties to this controversy were represented by very able counsel and hearings were held in open court. The Trustee assumed the burden of proof, and it developed that there was no material dispute as to the facts and there were no unsettled questions of Louisiana law involved. After the hearings concluded, all the parties were given an opportunity to file briefs and proposed findings of fact and conclusions of law. Excellent briefs have been filed and counsel for all of the parties have cooperated with the Court to the fullest extent.

2. The respondent Ernest Cockrell is a resident of the State of Texas; the respondent Gulf Refining Company is a corporation organized under the laws of the State of Delaware; the respondent Humble Oil and Refining Company is a corporation organized under the laws of the State of Texas; the respondent Gulf Refining Company of Louisiana is a corporation organized under the laws of the State of Louisiana; the respondent Shell Oil Company, Inc. (formerly known as the Roxana Petroleum Corporation) is a corporation organized under the laws of the State of Virginia, the respondent Freeport Sulphur Company is a corporation organized under the laws of the State of Texas.

3. Petitioner, in his original petition filed as Temporary Trustee on August 23, 1938, and in his amended petition filed as Permanent Trustee on January 14, 1940, in substance alleges that the respondents in defiance of the demands and rights of the petitioner and without any substantial adverse claim, but merely under a colorable and pretended claim, are and for several years have

been wrongfully mining and removing oil and sulphur in large quantities from the Debtor's real estate in the petition described; and that said wrongful conduct and acts are harassing and delaying the petitioner in his efforts to protect the assets of the Debtor, interfering with and preventing the formulation of any plan of reorganization depreciating the value of said real estate and removing the oil and sulphur from the possession and control of the Trustee without paying any compensation therefor to the Debtor or its Trustee. The petitions pray for summary relief. On orders to show cause the respondents admit the mining and removal without paying petitioner therefor, of large quantities of oil and sulphur from the said real estate and attempt to justify their doing so by virtue of certain leases hereinafter referred to.

4. The tract of land comprising 52,500 acres more or less, described in the petition, located in Plaquemines Parish, Louisiana, was owned by the State of Louisiana as "Tidal Overflow Lands" until 1914, when, by act of the Louisiana Legislature, it was conveyed to the Buras Levee Board (Res. Ex. 74). In 1919 it was sold and conveyed, without mineral reservation or exception, by the Buras Levee Board at Sheriff's Sale to J. Homer Jordan, Trustee (Res. Ex. 23).

5. On February 3, 1927, at which time said land still belonged to Jordan, Trustee, the respondent Cockrell, who at that time had no right of ownership in it by virtue of contract or otherwise, offered it for sale to the Debtor's predecessor Mt. Forest Fur Farm, in a letter (Ex. 2) reading as follows:

"Feby. 3rd, 1927.

"Mr. S. Bangs, Manager,
"Mt. Forest Fur Farms,
"Mt. Forest, Mich.

"Dear Sir:

"Would you be interested in purchase of fifty to seventy-five thousand acres Louisiana Coast Marsh Lands suitable for rats, at $2.50 per acre cash, subject to reservation of one-eighth of the minerals.

"If so, get in connection with me by wire, above address.

"Yours truly,
"(Signed) E. Cockrell."

6. On February 8, 1927, the respondent Cockrell sent a telegram (Ex. 3) to Mt. Forest Fur Farms which reads as follows:

"Feb. 8, 1927

"Mt. Forest Fur Farm
"Detroit Mich

"Advise you come here at once if interested as no option will be given unless substantial cash deposit made stop Best game preserve in South and lies in a section that will be developed for oil stop Trapping rights alone worth more than price asked for land

"Ernest Cockrell"

7. On March 11, 1927, Bangs, General Manager of Mt. Forest Fur Farms, who became interested in the purchase of said property through Cockrell's letter and telegram quoted above inspected said real estate in company with Nigh, an associate or partner of Cockrell,

who exhibited gas seepages on the property, ignited the same, and as an inducement to a sale pointed out its oil possibilities.

8. On March 12, 1927, at a hotel in New Orleans, the terms of sale were orally agreed upon between Cockrell and Bangs and immediately thereafter the respondent Cockrell personally composed and typed out the sales contract which was then signed by the parties and by the witnesses (Ex. 9). Said written contract in part reads as follows:

> "3. First party agrees to furnish second party abstract of title covering said lands showing clear titles thereto, except as to the deferred payments named herein which are to be assumed by second party when title is passed, and also subject to a perpetual minerals reservation equal to one-eighth of all minerals, including oil, gas and sulphur, which may be found in, under and upon said land; . . ."

9. On March 14, 1927, two days after respondent Cockrell had entered into the written contract to sell the property at $2.00 per acre, reserving one-eighth of the minerals, he obtained a thirty day option from Jordan, Trustee, to purchase an undivided 127/150ths interest in the same property, without mineral reservation or exception, at $1.50 per acre (Ex. 52).

10. Shortly after March 14, 1927, it became known to Mt. Forest Fur Farms that respondent Cockrell was unable to acquire and consequently was unable to convey full ownership of said land. On or about March 17, 1927, payment of the $500 check referred to in the con-

tract of sale was stopped by Mt. Forest Fur Farm pending clearing of the title. Cockrell kept said check and advised Mt. Forest Farm on March 19, 1927, as follows: "We enter into contract with your company in good faith and intend to go through with it." (Ex. 11). On or about March 21, 1927, Cockrell advised Mt. Forest Fur Farm that he would shortly have "deed ready to close deal" and requested Mt. Forest Fur Farm to have $25,000 certified check ready for cash payment (Ex. 12) and on or about the same day Mt. Forest Fur Farm advised Cockrell that he should present his deed to McEnery and "money will be paid as soon as deed is found good" (Ex. 13).

11. On March 29, 1927, Jordan, Trustee, conveyed to respondent Cockrell an undivided 127/150ths of said tract of land without mineral reservation or exception (Ex. 60).

12. On April 11, 1927, respondent Cockrell conveyed by act of sale with full warranty, and undivided 127/150ths of said real estate to Mt. Forest Fur Farm, which said deed contained the following reservation:

> "This Vendor is vested with and specially retains for himself, his heirs and assigns, and reserves from this sale, a perpetual royalty equal to one-eighth of all minerals, including oil, gas and sulphur, which may be found in, under, upon or beneath the lands hereinabove described, together with perpetual and exclusive rights to make and execute mineral leases on all or any portion of said lands for the exploration, development, production and marketing of any and all of said minerals, and also including perpetual rights of in-

> gress and egress solely for said purpose of exploration, development, production and marketing of said minerals, at all times, and likewise the use of so much of the surface of said premises as may be found necessary and convenient for the exploration, development, production and marketing of said minerals which may be found and produced from said premises." (Ex. 29.)

This reservation was suggested and the language thereof was entirely composed by Cockrell.

13. On March 15, 1928, respondent Cockrell, without claim or color of right as to the Moran 23/150ths, and claiming to act under the mineral reservation contained in his deed to Mt. Forest Fur Farms, executed a mineral lease in favor of the Gulf Refining Company of Louisiana purporting to lease the minerals under the entire 52,500 acre tract hereinabove described, which lease was not recorded with the Register of Deeds of Plaquemines Parish, Louisiana, until May 9, 1928. This lease provided for the payment by the lessee, or its assigns, of a royalty of 1/6th of the oil produced and a royalty of $1.00 per ton for sulphur produced. The lease further provided, with respect to said royalties, that:

> "These royalties are based on ownership by grantor of the entirety of the land; if grantor owns less than the entirety, the royalties shall be proportionately decreased." (Ex. 58-a.)

14. On May 7, 1928, the Moran Corporation of the South, Inc., then the owner of an undivided 23/150ths of said property executed a mineral lease to the Roxana Petroleum Corporation, now known as the Shell Oil

Company, Inc., which said lease was recorded on June 6, 1928. (Res. Ex. 33.)

15. On June 30, 1928, Mt. Forest Fur Farm acquired the outstanding undivided 23/150ths of said land by deed from the Moran Corporation of the South, Inc., which said deed reserved to the grantor all the minerals, which reservation reads as follows:

> "From this sale there is especially excepted all oil, gas, sulphur and other minerals of every kind or character and the same are hereby reserved by the said vendor, together with the right of free ingress and egress, at all times, for the purpose of prospecting, exploring, developing, producing, storing and/or marketing said minerals and all such other rights and privileges as may be necessary or incidental thereto." (Ex. 53.)

16. The Debtor, Mt. Forest Fur Farms of America, Inc., acquired from its predecessor, Mt. Forest Fur Farm, the Michigan corporation, by deed dated as of September 28, 1928, all of said Michigan corporation's rights, title and interest in and to the properties acquired by Mt. Forest Fur Farm from Cockrell and the Moran Corporation of the South, together with every right and cause of action which had been vested in Mt. Forest Fur Farm because and by virtue of its ownership of said property (Ex. 56.)

17. Between April 11, 1927, and June 30, 1928, said Michigan corporation was the owner in fee simple and in actual physical possession of an undivided 127/150ths of said land.

18. Between June 30, 1928, and September 28, 1928, said Michigan corporation was the owner in fee simple and in actual physical and exclusive possession of the whole of said land.

19. From September 28, 1928, to August 15, 1938, said lands have been in the actual physical and exclusive possession of said Debtor and its agents and representatives.

20. From August 15, 1938, to date said lands have been and are in the actual physical and exclusive possession of the petitioner trustee of said Debtor by appointment of and under the direction of this Court.

21. The fee simple title of the Debtor to the undivided 23/150ths of said lands acquired through the Moran Corporation of the South, Inc., is encumbered or burdened by the above described servitude or mineral reservation contained in the deed from the Moran Corporation of the South, Inc. The rights retained by this reservation, as also the rights established by the previously granted mineral lease, are not involved in the present litigation.

22. By virtue of the reservation contained in the deed from respondent Cockrell to Debtor's predecessor, it is conceded by the petitioner that said Cockrell reserved to himself a servitude of one-eighth of 127/100ths of the minerals in, on or under said land.

23. The petitioner claims that the Debtor is the owner of all of the minerals in, on or under 127/150ths of said land, less the one-eighth reserved by Cockrell in his deed to the Mt. Forest Fur Farm. The respondent Cockrell

and his lessees and sub-lessees, the other respondents, claim that the respondent Cockrell, subject to his outstanding leases and subleases, is the owner of all the mineral rights in 127/150ths of the said lands by virtue of the reservation contained in said deed from Cockrell to Mt. Forest Fur Farm.

24. The principal problem presented by these proceedings is the construction to be given to the language of the reservation contained in the deed from respondent Cockrell to Mt. Forest Fur Farm.

25. The meaning of said mineral reservation has never been judicially determined. Counsel for respondent Gulf Refining Company, on September 19, 1927, when he was counsel for Roxana Petroleum Corporation, now respondent Shell Oil Company, Inc., and six months before Cockrell made any mineral lease on the property, gave a written opinion (Ex. 24) to the effect that said reservation was ambiguous and said written opinion was communicated to respondent Cockrell on September 21, 1927 (Ex. 25). Counsel for the other corporate respondents have from time to time recognized and admitted ambiguity in various particulars of said reservation.

26. This Court finds as a matter of fact and law that said reservation is ambiguous and finds that in order to interpret the meaning of said reservation it is necessary to examine the preceding agreements, correspondence, conversations and surrounding circumstances in order to determine as a matter of fact the true intention of the parties thereto.

27. Cockrell's original offer to sell the property (Ex. 2) and the written agreement of sale of March 12, 1927 (Ex. 9), show plainly that it was the intention of both parties that the seller was to reserve only one-eighth of the minerals and that the buyer was to receive, with the land, seven-eighths of said minerals. Said agreement was never rescinded, cancelled or terminated, and was only modified to the extent made necessary by Cockrell's inability to convey more than an undivided 127/150ths of said property, which modification called for a proportional reduction of the purchase price. In all other respects the deed of April 11, 1927, was intended by the parties to and did carry out their respective obligations under said agreement of March 12, 1927.

28. The use of the word "royalty" in the deed in place of the word "reservation" in the contract, was made by Cockrell in an endeavor to avoid the operation of that provision of the Louisiana law which prescribes a reservation of minerals for non-user in ten years and was not done for the purpose of enlarging and it was not the intention of the parties that the word used should enlarge the agreed mineral reservation of one-eighth to a mineral reservation of eight-eighths.

29. Annexed to the deed from Cockrell to Mt. Forest Fur Farm of April 11, 1927, as recorded with the Register of Conveyances of Plaquemines Parish, Louisiana, and forming an integral part thereof, is a certified copy of a power of attorney from the Mt. Forest Fur Farm to one Charles P. McEnery, and a certified copy of a resolution of the Board of Directors of Mt. Forest Fur Farm ratifying said agreement of March 12, 1927, hereinabove referred to and authorizing said attorney in fact to execute

an act of sale, limited solely to carrying into effect said prior agreement of March 12, 1927.

30. On October 13, 1928, Ernest Cockrell and the Gulf Refining Company of Louisiana entered into an agreement in writing under which said Gulf Refining Company of Louisiana designated or selected 10,000 acres for drilling and exploration out of said 52,000 acre tract hereinabove described, and abandoned any right to the balance of the acreage which is claimed to have leased from Cockrell under date of March 15, 1928 (Ex. 58-B).

31. Gulf Refining Company of Louisiana subsequently entered into a joint working agreement with Humble Oil & Refining Company and Shell Petroleum Corporation (now Shell Oil Company, Inc.) under the terms of which all three of said companies became jointly interested in the rights granted by Ernest Cockrell to Gulf Refining Company of Louisiana under the above described mineral lease and by which Humble Oil & Refining Company was designated to act as the operating company in the exploration and development of the rights granted by said mineral lease (Ex. 88-90).

32. Humble Oil and Refining Company drilled for oil upon the designated area, and on June 17, 1931, brought in a producing well. Since that time Humble Oil and Refining Company has drilled twenty-three wells upon said property, twelve of which have in the past produced oil and seven of which are presently producing oil.

33. From June 17, 1931, to March 1, 1940, Humble Oil and Refining Company has extracted a total of 2,714,311.26 barrels of oil from said property of the market value of $1,925,861.36. Since the date of the

appointment of the petitioner as Trustee for the Mt. Forest Fur Farms of America, Inc., on August 15, 1938, to March 31, 1940, said Humble Oil and Refining Company has produced and disposed of 421,438.13 barrels of oil from said property having a market value of $213,907.77, exclusive of royalties. Said Humble Oil and Refining Company is now extracting approximately 600 barrels of oil per day from said property.

34. On February 10, 1932, Freeport Sulphur Company obtained and accepted an assignment and sublease from the Gulf Refining Company, Humble Oil and Refining Company and the Shell Petroleum Corporation, purporting to give it the exclusive right to mine sulphur from said designated area hereinabove described.

35. Freeport Sulphur Company drilled the first prospect well on said property on or about March 15, 1932, and began producing sulphur from said property in December, 1933. Since that date one hundred seventeen sulphur wells have been drilled on the land area involved, and a total of 1,621,060 tons of sulphur have been produced from said land area up to December 31, 1939, from which a total of approximately $25,000,000.00 has been realized. Freeport Sulphur Company is likewise producing substantial quantities of sulphur from the bed of Lake Grand Ecaille under and by virtue of a lease from the State of Louisiana. The Debtor makes no claim to the sulphur produced from said lake bed and the same is therefore not an issue in these proceedings.

36. Freeport Sulphur Company has produced a total of 647,494 tons of sulphur from the property involved since the appointment of the petitioner as Trustee of Mt.

Forest Fur Farms of America, Inc., and is now producing and removing from said property approximately 40,000 tons of sulphur per month. This sulphur has a present market value of approximately $15.39 per ton after providing for freight and handling charges. Over the period from December, 1933, to date, the average market price has been approximately $16.66 per ton. The cost of production, exclusive of royalties but including overhead expense, federal taxes, etc., is $7.65 per ton. Royalties equal to $1.15 per ton are being paid to Cockrell, Moran, et al., and overriding royalties equal to approximately $2.84 are being paid to Oil Company respondents.

37. On January 14, 1933, Freeport Sulphur Company acquired from the Debtor Corporation a surface lease for a period of ninety-nine years of a portion of the aforesaid property of Debtor Corporation. Under the terms of this lease Freeport Sulphur Company was entitled, as lessee, to make use of the surface of the leased premises, but the right to exploit any minerals in and under said leased premises was specifically excluded. Freeport Sulphur Company has, since the approximate date of said lease, and under the authority thereof, occupied said leased premises as the tenant or lessee of Debtor Corporation (Ex. 71-A).

38. It was the clear intention of the parties in making the deed of April 11, 1927, that Ernest Cockrell should reserve and he did, in fact, reserve unto himself only one-eighth of 127/150ths of the minerals.

39. It was likewise the intention of the parties in making the deed of April 11, 1927, that Ernest Cockrell

should reserve and he did, in fact, reserve unto himself the exclusive right to make a lease for the exploration and development only of said one-eighth of 127/150ths of the minerals reserved by him.

40. The Gulf Refining Company of Louisiana and all corporate respondents claiming under it hold a lease from Ernest Cockrell covering his one-eighth of 127/150ths of the minerals in or under the property of Debtor but none of the corporate respondents holds a lease covering the remaining seven-eighths of 127/150ths of the minerals in or under said property, which belongs to Debtor.

41. The ambiguity of the phraseology contained in the reservation in the deed from Cockrell to Mt. Forest Fur Farm has been known to and recognized by all of the corporate respondents and no transactions were had by any of said corporate respondents with Cockrell or any other person or corporation claiming under him upon the belief that said reservation was clear and unambiguous.

42. The Gulf Refining Company of Louisiana paid $26,250.00 to Ernest Cockrell on March 15, 1928, for the privilege of "shooting" (making geophysical exploration upon) the property hereinabove described solely because of the reliance placed by L. P. Garrett, assistant to the president of the respondent company, upon the word of Ernest Cockrell that he owned all the minerals in said above described property and no provision was made for the repayment of said sum in the event said Cockrell did not own such mineral rights above described. These shooting rights were exercised after it was known to Gulf

Refining Company of Louisiana that Cockrell did not own all said minerals.

43. In October, 1928, an extension agreement was entered into by and between said Cockrell and said Gulf Refining Company of Louisiana under which Gulf Refining Company of Louisiana paid an additional $25,000.00 to Cockrell, and all warranty of title by said Cockrell as to his mineral rights in the land covered by the lease of March 15, 1928, was eliminated (Ex. 58-B). This was done with actual knowledge by Gulf Refining Company of Louisiana that Cockrell did not own all of the minerals in said leased land and such fact was then disclosed by the public records of Plaquemines Parish.

44. Before entering into said mineral lease with Ernest Cockrell, respondent Gulf Refining Company of Louisiana knew of the ambiguity in the reservation contained in the deed from Cockrell to Mt. Forest Fur Farm, and entered into said lease in disregard of the rights of said Mt. Forest Fur Farm; it did not rely upon the public records or seek the advice of legal counsel as to Cockrell's rights under said reservation and as to the respective mineral interests of said Cockrell and Mt. Forest Fur Farm, and made no inquiry to ascertain the facts or the basis upon which Mt. Forest Fur Farm claimed seven-eighths of 127/150ths of the minerals. Nor did it exercise the ordinary care which should have been exercised by such corporation in taking title to valuable property rights upon which it expected to make large investments.

45. Before entering into the joint operating agreement, respondents Shell Petroleum Corporation and

Humble Oil and Refining Company knew of the ambiguity with respect to the mineral reservation contained in the deed from Cockrell to Mt. Forest Fur Farm. Both of said respondents were advised by their counsel as to said ambiguity; they did not rely upon the public records and made no inquiry to ascertain the facts and did not inquire of Mt. Forest Fur Farm as to the basis of its claim to seven-eighths of 127/150ths of the minerals; nor did said respondents in the transaction exercise the ordinary care which should have been exercised by such corporations in such matters.

46. In making and accepting the sublease from respondent oil companies, Freeport Sulphur Company knew of the ambiguity in the mineral reservation contained in the deed from Cockrell to Mt. Forest Fur Farm. No written opinion was requested of its counsel and the only counsel who gave an opinion testified that he gave only a verbal opinion and that in giving such opinion he was in no way concerned with an interpretation of the respective mineral rights of said Cockrell and said Mt. Forest Fur Farm, and did not examine the documents annexed to and recorded with the deed of April 11, 1927, or the agreement of March 12, 1927, referred to therein.

47. On November 7, 1930, respondent oil companies were advised by Edward M. Heath, then attorney for Mt. Forest, that said company claimed seven-eighths of the minerals. In its answer filed in the so-called Buras Levee suit, the Debtor Corporation again gave notice to the respondent oil companies and to Cockrell of its claim to seven-eighths of the minerals and by stipulation of counsel entered into, in open court, said claim was reserved out of said Buras Levee litigation. Since 1931

all of the respondents have had notice to the effect that Debtor Corporation claimed seven-eighths of the minerals found in, on or under said above-described property.

48. In March, 1934, the oil companies attempted to obtain the consent to and execution by Debtor of a written agreement prepared by counsel for said respondents expressly or tacitly recognizing and adopting the Cockrell lease and agreeing that their failure to pay royalties to said Mt. Forest Fur Farms of America, Inc., on minerals produced from said above-described property would not constitute a forfeiture of said lease in the event that it should be ultimately determined that Mt. Forest Fur Farms of America, Inc., was the owner of seven-eighths of said minerals. Mt. Forest Fur Farms of America, Inc., refused to enter into this agreement (Ex. 66).

49. During 1934 and up to January, 1935, Freeport Sulphur Company attempted to obtain a similar agreement from Mt. Forest Fur Farms of America, Inc., with respect to sulphur royalties, and again said Mt. Forest Fur Farms of America, Inc., refused to enter into such an agreement (Ex. 68, 69).

50. No royalties on any oil or sulphur produced from said property hereinabove described have ever been paid by any of the respondents to Mt. Forest Fur Farm, a Michigan corporation, to Mt. Forest Fur Farms of America, Inc., a Delaware corporation, and the within Debtor, to Harry J. Merritt, State Court Receiver for the Debtor Corporation, the petitioner as Trustee for the Debtor Corporation, or any other official, agent, or attorney for said Debtor Corporation.

51. Since March 5, 1930, the Debtor Corporation has been in continuous and uninterrupted litigation involving internal difficulties.

52. Immediately after oil began to be produced on June 17, 1931, from the property involved in this suit, the Board of Commissioners of the Buras Levee District of Louisiana instituted a suit in the Twenty-fifth Judicial District of the Parish of Plaquemines, Louisiana, against the Mt. Forest Fur Farms of America, Inc., Ernest Cockrell, the Moran Corporation of the South, Inc., Humble Oil & Refining Company, Gulf Refining Company of Louisiana and the Shell Petroleum Corporation. Said suit was what is called in Louisiana a petitory action and its purpose, in the nature of ejectment, was the recovery of an area comprising 1136 acres alleged to be located in Sections 11, 12 and 13 in Township 20 South, Range 26 East. The sole basis of the claims asserted by plaintiff was that the property of Debtor should be surveyed in a certain manner.

53. The Supreme Court of Louisiana decided that case against the Buras Levee Board and in favor of the Mt. Forest Fur Farms of America, Inc., et al., on October 30, 1933, a petition for rehearing being denied on January 2, 1934. Said case is reported in 178 La. 696, 152 So. 497.

54. In its decision in the aforesaid Buras Levee Board case, the Supreme Court of Louisiana as a matter of fact adopted the surveying theory advanced by Mt. Forest Fur Farms of America, Inc., Ernest Cockrell, Moran Corporation of the South, Inc., Gulf Refining Company of Louisiana, Shell Petroleum Corporation and

Humble Oil & Refining Company, and rejected the theory of surveying advanced by the Board of Commissioners of the Buras Levee District.

55. The Supreme Court of Louisiana likewise held, as "outstanding and indisputable facts":

> "(7) The State intended to grant, and did grant to the levee board, and the board intended to sell, and did sell, to Jordan, trustee, all the land area within this parallelogram 6 by 9 miles, all according to the Payne plats, this being apparent, because the state was obligated under legislative enactment to transfer all its lands of this character to the board; the purpose of the board being to get all it could for its property.
>
> "(8) It is immaterial to the state, to the levee board, or these defendants whether the Payne plats showed ideal or full sections, or whether they showed short or irregular sections; the fact being that they did show all the land acreage in the entire territory."

56. Since said decision neither the Board of Commissioners of the Buras Levee District nor the Parish of Plaquemines has ever attempted to disturb the possession of title of the Mt. Forest Fur Farms of America, Inc., or its Trustee, nor have they or either of them instituted any further proceedings against said Mt. Forest Fur Farms of America, Inc., or its Trustee asserting any claim to any part of the entire tract of 52,500 acres hereinabove more fully described.

57. Following the decision in the so-called Buras Levee case hereinabove referred to, Ernest Cockrell filed

a suit against the Board of Commissioners of the Buras Levee District in the United States District Court for the Eastern District of Louisiana, asking that a declaratory judgment be rendered adjudging the decision of the Supreme Court of Louisiana in the so-called Buras Levee Board case to be res adjudicata as to all land situated in Township 19 South, Range 26 East and Township 20 South, Range 26 East. The District Court granted a judgment in favor of Cockrell, reported in 16 Fed. Supp. 273, but upon appeal the Circuit Court of Appeals for the Fifth Circuit reversed the lower court in a decision reported in 91 Fed. (2d) 412. Application to the Supreme Court of the United States for writ of certiorari was denied on November 1, 1937, reported in 302 U. S. 740.

58. The United States Circuit Court of Appeals for the Fifth Circuit in said case held that the decision of the Supreme Court of Louisiania in the so-called Buras Levee case was res adjudicata only as to the land area actually involved therein. This area admittedly included all the land from which oil has been produced and is presently being produced, and a portion of the land from which some of the sulphur has been produced.

59. The evidence in this case, presented by the respondents, affirmatively establishes that all of the operating area, other than the lake bed portion, thereof, from which oil and sulphur has been and is being produced, is located on the property of the debtor.

60. Respondents have not identified or described any land which they allege is claimed by the Buras Levee

Board.

61. On the same day that the Supreme Court of the United States denied certiorari in the declaratory judgment suit above referred to, Ernest Cockrell filed a second suit against the Board of Commissioners of the Buras Levee District in the United States District Court for the Eastern District of Louisiana, being known as Equity Suit No. 496, being an action to quiet Cockrell's alleged title to a certain mineral interest in the land in Township 19 South, Range 26 East and Township 20 South, Range 26 East, except the 1136 acres hereinabove referred to. This suit was never tried but was dismissed without prejudice by Ernest Cockrell.

62. In May, 1938, all respondents herein entered into an agreement of compromise with Buras Levee Board, Parish of Plaquemines and the State of Louisiana, under the terms of which, among other things, they agreed to pay certain royalties to the Parish of Plaquemines as assignee of Buras Levee Board upon sulphur produced from land belonging to Debtor Corporation, and they fixed as between themselves the boundary line between said land and the bed of Lake Grande Ecaille (Res. Ex. 56).

63. Although the Freeport Sulphur Company claims to hold leases under the Buras Levee Board, said company has never paid any royalties under said leases. The only sums ever paid by Freeport Sulphur Company to the Buras Levee Board or to the Parish of Plaquemines, its successor, have been paid pursuant to said compromise agreement of May, 1938. In view of the surrounding circumstances the making of said compromise

agreement constitutes no evidence of any claim to the property of the debtor on the part of the Buras Levee Board or the Parish of Plaquemines.

64. Under said compromise agreement of May, 1938, any and all rights which respondent Cockrell may have acquired or secured from or been subrogated to by Buras Levee Board and/or the Parish of Plaquemines with respect to the property of the Debtor enure to the benefit of the Debtor under the warranty made by Cockrell in his conveyance to Mt. Forest Fur Farm hereinabove described.

65. Neither the Mt. Forest Fur Farms of America, Inc., nor any of its officers, agents or representatives were parties to the aforesaid compromise agreement or knew of its intended execution, and a studied effort was made on the part of all the respondents not to inform Debtor or its representatives that said agreement had been executed. The oil company respondents collaborated with respondent Cockrell in an effort to use said compromise agreement of May, 1938, "to afford said Cockrell the fullest protection possible against claims of Mount Forest Fur Farms and Mount Forest Fur Farms of America" (Ex. 109).

66. Neither the Parish of Plaquemines nor the Board of Commissioners of the Buras Levee District are asserting any adverse claims against petitioner or Mt. Forest Fur Farms of America, Inc., in this proceeding and the adverse claims of title which the respondents attribute to the Parish of Plaquemines and the Board of Commissioners of the Buras Levee District have no serious foundation.

67. Respondents have pleaded that the decision rendered by the Supreme Court of Louisiana, in the case entitled and numbered Mt. Forest Fur Farms of America, Inc. v. Ernest Cockrell, No. 31,791 of the docket of said Court, reported in 179 La. 795; 155 So. 228, is res adjudicata and is a complete judicial estoppel against petitioner to the right of respondents to produce and market minerals from the "operating area."

The Court has examined the record and opinion in the above-entitled action, and finds that the only matter put in issue was the right of Cockrell to retain for himself a so-called bonus of $50,000.00 which he had received from the Gulf Refining Company of Louisiana as a consideration for the execution by him of the mineral lease granted by him to Gulf Refining Company on March 15, 1928, and for the extension of said lease to which lease the debtor was not a party.

The Supreme Court of Louisiana held that Ernest Cockrell acted for his own account in making that lease and not as agent for Mt. Forest Fur Farms of America, Inc., and that he was accordingly entitled to receive and retain whatever was paid to him as a bonus for making or extending the lease. The Court was not asked to decide, and did not decide, as has been admitted by attorneys for the corporate respondents, the percentage of mineral interest in the land of the Debtor Corporation affected by that lease. No court has heretofore been called upon to determine, or has adjudged, the percentage of the mineral interest affected by said lease.

68. (a) Before bankruptcy in March, 1936, and while the Debtor was in receivership in the Circuit

Court of Wayne County, Michigan, a suit was filed on behalf of the Debtor and others in the Twenty-fifth Judicial District Court for the Parish of Plaquemines, Louisiana, against the respondents herein and others praying for a declaration, made contradictorily, as to the rights of the parties to said suit as to the matters set forth in said petition. Said suit is still pending and has never been tried or determined. The petitioner in these proceedings has never become a party to said proceedings nor has he ratified or adopted said litigation.

(b) On or about April 9, 1936, one Bruce Nunez, was appointed curator ad hoc for the respondent, Cockrell, in said suit and on the same day he filed exceptions to the jurisdiction on behalf of Cockrell, as well as exceptions of misjoinder and of no cause of action. On August 5, 1936, the respondent Cockrell and Herold, Cousin & Herold, filed an answer to the merits in said suit asserting as special defenses estoppel and res adjudicata.

(c) On April 15, 1936, Gulf Refining Company of Louisiana, Gulf Refining Company, Humble Oil and Refining Company, Shell Petroleum Corporation and Freeport Sulphur Company filed exceptions to the jurisdiction in said suit alleging that said Court did not have jurisdiction over the person of said corporations. On March 9, 1939, seven months after the petitioner herein had filed his original petition for summary relief against the respondents, all of said corporate respondents filed pleas of estoppel and res adjudicata, exceptions and motions to strike, and exceptions of no cause or right of action.

(d) In the forepart of November, 1939, the respond-

ent Cockrell, his curator ad hoc and his counsel and associates, fixed for trial on Tuesday, November 14, 1939, the exceptions and motions to strike, the exceptions of no cause or right of action and pleas of estoppel and res adjudicata heretofore filed by said parties. Upon application of the petitioner this Court entered an order on February 22, 1940, enjoining Cockrell, et al. from proceeding with said hearing in Plaquemines Parish, Louisiana, pending the further order of this Court.

(e) This Court has the sole and exclusive jurisdiction over the reorganization of the Debtor. No reorganization can be effected until the claim of the petitioner against the respondents herein is heard and determined. This Court has heretofore enjoined the respondent, Cockrell, from proceeding in the Plaquemines Parish suit, as above described, in order that the petitioner's claim against all of the respondents herein can be adjudicated promptly under the direction and control of this Court by summary proceedings as a necessary and indispensible prerequisite to the reorganization of the debtor.

CONCLUSIONS OF LAW

1. The petitioner, the Debtor Corporation, and its predecessor in title, Mt. Forest Fur Farm, have been in continuous, open, undisturbed and exclusive physical possession of the property involved in this controversy since June 30, 1928.

2. It is necessary in order to protect and preserve the estate of the Debtor Corporation and to prevent the depletion and exhaustion of the valuable mineral rights of the Debtor Corporation that this Court hear and

determine in a summary proceeding the controversy set forth in the pleadings.

3. All of the parties necessary to a complete adjudication of the pending controversy are presently before the Court. The Moran Corporation of the South, Incorporated, the Parish of Plaquemines or the Board of Commissioners of the Buras Levee District are not necessary or indispensible parties to this proceeding.

4. There are no unsettled questions of Louisiana law involved in this controversy of such a nature as to require the bringing of a plenary action in the State of Louisiana. The delay incident to the bringing of a plenary action in Louisiana and the difficulty and uncertainty in getting personal jurisdiction and venue over all the necessary parties would materially hamper the Trustee of the Debtor in the performance of his duties and cause serious and perhaps irreparable loss and damage to the estate of the Debtor.

5. Under the Louisiana Civil Code when a contract, deed, or act of sale is ambiguous, the Court is entitled to look to all the preceding agreements, correspondence, conversations, surrounding circumstances and any other parol evidence which will inform and advise the Court as to the true intention of the parties.

6. An ambiguous mineral reservation contained in a deed or act of sale, under the Civil Code of Louisiana, is to be construed most strongly against the party composing the same; it is likewise to be construed in favor of the purchaser as against the seller and also in favor of the grantee as against the reservor.

7. When a written recorded document makes reference to another instrument or instruments in writing, it is the duty and obligation of the party relying upon said written recorded instrument to use the ordinary prudence of a diligent man in examining said instrument or instruments referred to therein.

8. If the Court were required to disregard the parol or extrinsic evidence and to construe said ambiguous mineral reservation solely from the face of the instrument, then likewise in said event under the Civil Code of Louisiana all doubts would have to be resolved most strongly as against Cockrell. If the Court were required to thus limit itself to the face of said instrument it would construe said reservation to have the same meaning as it would if it considered all parol and extrinsic evidence offered by the parties in interest.

9. Under the mineral reservation contained in the deed from Ernest Cockrell to Mt. Forest Fur Farm dated April 11, 1927, Cockrell reserved unto himself only one-eighth of 127/150ths of the minerals in, on or under the land conveyed and seven-eighths of 127/150ths of the minerals were conveyed and transferred to Mt. Forest Fur Farm.

10. Under the reservation above referred to Cockrell reserved unto himself the exclusive right to make a lease for the exploration and development of said one-eighth of 127/150ths of the minerals and the lease which he granted unto the Gulf Refining Company of Louisiana dated March 15, 1928, was executed pursuant to said power.

11. Cockrell had no power or right to make a lease for the seven-eighths of 127/150ths of the minerals sold and conveyed by him to Mt. Forest Fur Farm, the ancestor in title of the Debtor Corporation, and neither the Gulf Refining Company of Louisiana nor any of the corporate respondents claiming there under it has ever had or now has a lease covering said seven-eighths of 127/150ths of the minerals owned by the Mt. Forest Fur Farms of America, Inc.

12. Neither the petitioner, Mt. Forest Fur Farms of America, Inc., nor its ancestor in title, Mt. Forest Fur Farm, ever ratified, accepted or adopted said lease granted by Cockrell to Gulf Refining Company of Louisiana dated March 15, 1928, in so far as said seven-eighths of 127/150ths of the minerals are concerned, and the petitioner is not now estopped to deny that the corporate respondents or any of them hold undler a lease covering said seven-eighths of 127/150ths of the minerals owned by said petitioner.

13. If the corporate respondents had obtained a mineral lease covering the seven-eighths of the 127/150ths of the minerals of the Debtor, whether by grant from Cockrell or by ratification by the Debtor, such lease was forfieited, dissolved and terminated prior to August 23, 1938, because of the failure of any and all of the corporate respondents to perform, as to the Debtor, any and all of their obligations of such lease in total disregard of the demands of the Debtor for the payment of any rents or royalties that were due thereunder.

From August 23, 1938, the date of the original petition for summary relief filed by the Trustee herein as against

the respondents, to the date hereof, none of the corporate respondents have paid, offered to pay or tendered to the Debtor or to the Clerk of this Court any rents or royalties that would be accruing during said period if the corporate respondents were operating under a mineral lease covering seven-eighths of 127/150ths of the minerals owned by the Debtor. Therefore, if it be assumed that the corporate respondents had obtained such a mineral lease they would not at this time be entitled in equity to cure any default that may exist as to the non-payment of rents or royalties to the Debtor.

14. If the Debtor corporation, prior to the filing of the original petition for reorganization in these proceedings, and while under the control and direction of the Receiver appointed by the Circuit Court of Wayne County, Michigan, had offered to ratify or adopt the lease granted by Cockrell to Gulf Refining Company of Louisiana, on March 15, 1928, in so far as the seven-eighths of the 127/150ths of the minerals owned by the debtor were concerned, said offer to ratify or approve was conditional upon payment by the corporate respondents of seven-eighths of 127/150ths of the royalties due thereunder. There having been no payment of any royalties by any of the respondents to the Debtor at any time, it follows that if there were a conditional ratification or approval it was never accepted by any of the respondents herein and is not now binding upon the debtor or the petitioner.

15. No right has been asserted in these proceedings by the Board of Commissioners of Buras Levee District or by the Parish of Plaquemines as to any of the minerals in the property described in the petition; nor is any suit

or action pending in any other court brought by the Board of Commissioners of Buras Levee District or the Parish of Plaquemines claiming any right, title or interest in the minerals in, on or under the property in the petition described; the respondents have no right or standing to assert any such claim on behalf of the Board of Commissioners of Buras Levee District or the Parish of Plaquemines.

16. Under the law of Louisiana a mineral reservation prescribes in ten years for non-user as to non-contiguous property. The petitioner has excepted from these proceedings and has reserved for future determination the entire question as to whether or not the mineral reservation contained in the deed from Cockrell to Mt. Forest Fur Farm dated April 11, 1927, has prescribed as to any non-contiguous property in the entire tract of 52,500 acres involved in this controversy.

17. The respondents Freeport Sulphur Company and Humble Oil and Refining Company have taken assets of the corporation and should be required to compensate the estate for the value of these assets. The Trustee is entitled to seven-eighths of 127/150ths of the proceeds of the minerals so produced. A court of bankruptcy has an excluive and non-delegable control over the administration of an estate in its possession, and in carrying out this duty entrusted to the Court it is essential that the officers deal fairly with all parties, having in mind at all times the best interests of the estate to be administered. The companies are entitled to be compensated for the cost of producing the minerals belonging to the estate, including overhead expenses and a sufficient sum to be

set aside as a depreciation reserve which will amortize their investment in plant and improvements over a reasonable period of time. These companies should also be entitled to a reasonable profit, and in estimating this profit among other matters to be taken into consideration are the size of the investment and the risk involved. If the Trustee and these two respondents can agree upon a basis of settlement which is fair to all parties, such a settlement will be approved. If they are unable to reach a settlement this matter shall be re-submitted for an accounting. If the settlement herein suggested is not completed before July 10th, 1940, an injunction shall issue restraining these respondents from taking any more of the oil or sulphur from the premises.

An order may be entered in accordance with these findings.

ARTHUR F. LEDERLE
United States District Judge.

June 20, 1940.

AMENDED FINDINGS OF FACT AND CONCLUSIONS OF LAW

Finding of Fact No. 2: The last word in said paragraph is hereby changed from "Texas" to "Delaware".

Finding of Fact No. 51 is hereby amended to read as follows:

"Since March, 1930, the Debtor corporation has been in continuous and uninterrupted litigation involving internal difficulties. On March 5, 1930, a stockholders'

suit was brought against the Debtor corporation, et al., in the Circuit Court for the County of Wayne and on August 21, 1931, Harry J. Merritt was appointed receiver for the Debtor corporation in said proceedings (Exhibit 81). Subsequently the Debtor became enmeshed in a series of lawsuits brought in an effort to reorganize said corporation and to transfer jurisdiction thereover to the federal courts. Said litigation included an involuntary proceeding brought against the Debtor corporation under Section 77-B of the Bankruptcy Act, a voluntary proceeding brought by Mt. Forest Fur Farm, a Michigan corporation, and the within voluntary proceedings brought by the Debtor. All of said efforts were opposed by the State Court Receiver and his counsel, during which time the Debtor was suspended between the jurisdiction of the state and federal courts, and it was not until certiorari was denied by the Supreme Court of the United States in the within proceedings on October 9, 1939 (84 L. Ed. 85) that the Debtor, for the first time, was assured of its jurisdiction and was able to proceed against the respondents."

Paragraph 3 of Finding of Fact No. 67 is hereby amended to read as follows:

"The Supreme Court of Louisiana held that Ernest Cockrell acted for his own account in making that lease and not as agent for Mt. Forest Fur Farms of America, Inc., and that he was accordingly entitled to receive and retain whatever was paid to him as a bonus for making or extending the lease. The Court was not asked to decide, and did not decide, the percentage of mineral interest in the land of the Debtor corporation affected by that lease; likewise, the Court was not asked to decide,

and did not decide, as has been admitted by attorneys for the corporate respondents, the percentage of mineral interest owned by the Debtor corporation in said land. No court has heretofore been called upon to determine, or has adjudged, the percentage of the mineral interest affected by said lease."

Conclusion of Law No. 7 is hereby amended to read as follows:

"When a written recorded and ambiguous document makes reference to another instrument or instruments in writing, it is the duty and obligation of the party relying upon said written recorded instrument to use the ordinary prudence of a diligent man in examining said insrtument or instruments referred to therein."

ARTHUR F. LEDERLE
District Judge

(3)

Office - Supreme Court, U.S.
FILED
DEC 19 1941
CHARLES ELMORE CROPLEY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

FRANK FITZGERALD, Trustee for MT. FOREST FUR FARMS OF AMERICA, INC.,
Petitioner,

v.

GULF REFINING COMPANY OF LOUISIANA,
GULF REFINING COMPANY,
HUMBLE OIL AND REFINING COMPANY,
SHELL OIL COMPANY, INC.,
FREEPORT SULPHUR COMPANY, and
ERNEST COCKRELL,
Respondents.

Nos. 763-769

BRIEF ON BEHALF OF RESPONDENTS FREEPORT SULPHUR COMPANY, GULF REFINING COMPANY OF LOUISIANA, GULF REFINING COMPANY, HUMBLE OIL AND REFINING COMPANY, AND SHELL OIL COMPANY, INC., IN OPPOSITION TO PETITION FOR WRITS OF CERTIORARI.

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Attorneys for Respondents Freeport Sulphur Company, Gulf Refining Company of Louisiana, Gulf Refining Company, Humble Oil and Refining Company, and Shell Oil Company, Inc.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

FRANK FITZGERALD, Trustee for MT. FOREST FUR FARMS OF AMERICA, INC.,
Petitioner,

v.

GULF REFINING COMPANY OF LOUISIANA,
GULF REFINING COMPANY,
HUMBLE OIL AND REFINING COMPANY,
SHELL OIL COMPANY, INC.,
FREEPORT SULPHUR COMPANY, and
ERNEST COCKRELL,
Respondents.

Nos. 763-769

BRIEF ON BEHALF OF RESPONDENTS FREEPORT SULPHUR COMPANY, GULF REFINING COMPANY OF LOUISIANA, GULF RFFINING COMPANY, HUMBLE OIL AND REFINING COMPANY, AND SHELL OIL COMPANY, INC., IN OPPOSITION TO PETITION FOR WRITS OF CERTIORARI.

May It Please the Court:

STATEMENT OF THE CASE

This case involves an extraordinary and unprecedented attempt to require the respondents whom we represent to litigate in a court of bankruptcy in **Michigan** the respondents' title to mineral property situated in the State of **Louisiana** near the Gulf of Mexico, of which **the respondents have been in undisturbed, exclusive, open and notorious possession for many years.** The process of the bankruptcy court was served upon all the respondents extra-territorially.

In a summary proceeding, instituted by a rule to show cause, the District Court in Michigan, Honorable Arthur F. Lederle, Judge, undertook to try the title to this property, and by its judgment to dispossess the respondent oil companies and sulphur company therefrom. In exercising their rights over the property in controversy, respondents employ hundreds of men and utilize facilities representing investments of millions of dollars, **all to the full knowledge of the Debtor, which before the institution of this proceeding had never made any attempt to restrain the operations of the respondent companies, but on the contrary had expressly and repeatedly recognized their right to pursue the same.** By its judgment the Michigan federal court nevertheless undertook to enjoin the respondent companies from carrying on their operations. This judgment was reversed by the United States Circuit Court of Appeals for the Sixth Circuit, whose decision this Court is now asked to review.

The plaintiff and the present petitioner is the Trustee in Bankruptcy appointed by the District Judge in a bankruptcy reorganization proceeding instituted under Chapter X of the Bankruptcy Act. The Debtor is a Delaware corporation, which filed notice of withdrawal from Michigan in 1931, had no property in Michigan except 80 acres of land valued at $300, and at the time of the filing of the reorganization proceeding had negligible debts (R. IV-2197; I-4; IV-2073).

The respondents are Ernest Cockrell, a resident of Houston, Texas, four oil companies and a sulphur company. None of the defendants is domiciled in Michigan. The two corporate respondents who are carrying on the actual mineral operations (Humble Oil & Refining Company and Freeport Sulphur Company) do no business in Michigan and are not subject to ordinary service of pro-

cess there. As previously noted, service on all the respondents was made extra-territorially.

Although the petitioner describes the proceeding as one "to enjoin further depletion of the debtor's property", it is actually one to **try the title** to property **claimed** by the Debtor. The District Court attempted by extra-territorial service of process to compel respondents to litigate, in a court removed by more than a thousand miles from the situs of the property in controversy, the issues of local Louisiana law affecting the title to the Louisiana mineral rights in controversy which were, and long had been, in the possession of respondents.

Upon the merits, the controversy involves (a) the rights which the respondent Cockrell retained by virtue of a mineral reservation contained in a deed which he made to the Debtor's predecessor, and (b) the rights which the other respondents acquired under a mineral lease granted by Cockrell in 1928 pursuant to such reservation.[1]

In the **ten years** which elapsed from the date of this lease to the date of the institution of the present proceeding, the Debtor **repeatedly recognized** the respondents' lease and their right to conduct these operations (which have been actively in progress since 1928) by written demands and by sworn pleadings which the Debtor filed in various actions in the State courts of Louisiana, in all of which the Debtor claimed only royalties accruing under the very lease which the Trustee now attacks (R. IV-1641, 1934, 1607-8, 1959).

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[1]Cockrell, acting pursuant to the reservation contained in his deed to the Debtor's predecessor, made a mineral lease to Gulf (R. IV-1572). Subsequently Gulf, Shell and Humble pooled their rights under various leases, including the Cockrell lease, and Humble was designated to conduct the operations under these leases. In 1932 these oil companies subleased the sulphur rights to Freeport, reserving substantial royalties (R. IV-1663, 1859, 1721, 1855).

Thus, in an action which the Debtor brought in 1931 against Cockrell to recover the bonus which Cockrell had received for executing the lease, the Debtor alleged:

> "That while petitioner avers that according to the clause in the Act of April 11th, 1927, * * * the said Cockrell **had the right,** for and on behalf and in the name of petitioner as the owner of 127/150ths interest in the said property, **to make a valid lease of its interest** in and to the said lands for the exploration, development, production and marketing of **the minerals** in, under, upon or beneath said lands, petitioner avers that the said Cockrell was not entitled to receive and/or retain either the consideration for the making of said leases, or the consideration for the granting of any extension, or extensions, of said leases, or the consideration for the granting of any indulgence to the lessee thereunder." (R. IV-1938).[2]

In that action the Supreme Court of Louisiana expressly found, **as long ago as 1934,** that Cockrell

> **"unquestionably retained for himself * * * the perpetual and exclusive right to make and execute mineral leases on *all* or any portion of the land."** *Mt. Forest Fur Farms of America, Inc. v. Cockrell,* 179 La. 795, 798 (1934).

The District Court disregarded this decision of the Supreme Court of Louisiana (which the respondents had specially pleaded and which the Circuit Court of Appeals found to be *res judicata,* 122 F. (2d) 232, 244), and adopted the Trustee's contention that Cockrell

> "had no right or power to make any lease * * * of more than 1/8th * * * of the minerals in, on or under the above described real estate"

[2]Black lettering in this brief is always that of the authors of the brief unless it is otherwise stated.

and, indeed, even found that the corporate respondents had taken the minerals **"without any color of right"**! (R. I-339-40).

At the very time the proceedings were instituted in the bankruptcy court in Michigan (in 1938), there was pending in the State courts of Louisiana, and had been pending there **since 1936,** a proceeding instituted by the Debtor corporation against all the respondents, in which the Debtor by express allegations again recognized (as it had theretofore repeatedly recognized) the mineral rights of the respondent oil companies and the respondent sulphur company under the Cockrell lease and claimed only that royalties accruing under that lease should be paid to the Debtor instead of to Cockrell, the lessor (R. IV-1959).

In the District Court respondents filed motions to dismiss for lack of jurisdiction (R. I-60, 123, 124). Thereafter, with reservation of their rights under the jurisdictional issue, respondents moved the Court to stay the proceedings and refer the issues of Louisiana law to the Louisiana State courts, in accordance with the opinion of this Court in *Thompson, Trustee v. Magnolia Petroleum Co.*, 309 U. S. 478 (1940) (R. II-391-402). These motions were overruled by the District Court (R. III-1501).

In the District Court respondents also filed motions directing the Court's attention to the fact that the Board of Commissioners for the Buras Levee District, a Louisiana municipal corporation, and The Moran Corporation of the South, a Delaware corporation, were indispensable parties because of interests which they claimed in the property in controversy (R. II-403-6). These motions were also overruled (R. III-1501).

The District Court proceeded to try the case upon the merits, and on July 10, 1940, handed down a judgment against all of the respondents, holding that the lease granted by Cockrell was invalid as to the seven-eighths interest claimed by the Trustee. The judgment declared that Freeport and Humble had taken assets of the Debtor "without any color of right" and enjoined them from further production of oil and sulphur unless they paid over to the plaintiff Trustee the proceeds of all oil and sulphur production in controversy "less the cost of production and a reasonable profit thereon" (R. I-336-43).

Notwithstanding that the case involves questions of Louisiana law as to which the parties were in sharp conflict, and that the value of the mineral property in controversy is very large, the District Court rendered no written opinion. Instead, it adopted as its own the elaborate findings of fact and conclusions of law which were submitted to it by counsel for the Trustee and which (except for two paragraphs and for purely formal changes in two others) it accepted *verbatim* as written, without changing a comma (R. I-274-335).

The District Court not only rejected, without opinion or reasons, the motions to stay the cause and refer the issues of Louisiana law to the Louisiana courts for decision, consonant with the ruling of this Court in *Thompson, Trustee v. Magnolia Petroleum Co.*, 309 U. S. 478 (1940), but it actually undertook to **prevent** the Louisiana Supreme Court from passing upon the issues of Louisiana law by **enjoining** the trial of the case between the Debtor corporation and the respondents which is pending in the State courts of Louisiana and has been pending there since 1936 (R. I-329; for terms of order see Record in case No. 770).

By unanimous opinion handed down on August 15,

1941 (122 F. (2d) 232), the Circuit Court of Appeals for the Sixth Circuit reversed the decision of the District Court and directed that the motions of the respondents to dismiss the summary proceedings for lack of jurisdiction be sustained and the suit of the Trustee dismissed. In striking contrast to the District Court, the Circuit Court of Appeals rendered a careful and painstaking opinion, which states the facts of the case insofar as necessary for the consideration of the jurisdictional points.

ARGUMENT

Nothing in Chapter X of the Bankruptcy Act Gives a Bankruptcy Court Jurisdiction to Try the Title to Property Actually in the Possession of a Third Person Who Holds Under a Substantial Adverse Claim and Who Is Not Subject to the Territorial Jurisdiction of the Court.

It is conceded that as a matter of general bankruptcy law, a bankruptcy court has no jurisdiction to entertain a proceeding to recover property in the adverse possession of another who makes a claim of a substantial character thereto, or to try the title to such property; *Harrison, Trustee v. Chamberlin*, 271 U. S. 191 (1926).

In the District Court (as also in the Court of Appeals and now in this Court), the Trustee undertook to avoid the application of this rule by attempting a showing that the Debtor was in possession. The opinion of the Circuit Court of Appeals sufficiently demonstrates the lack of basis for such a contention upon the record. Realizing the difficulties of the contention, the Trustee made, and now makes, an alternative contention that the well-settled bankruptcy rule has been changed by the provisions for reorganization of corporations contained in

Chapter X of the Bankruptcy Act;[3] that under these provisions possession is no longer the test of jurisdiction; and that as to such proceedings Congress intended to give, and did give, the bankruptcy court **unlimited** jurisdiction over all property to which the debtor **asserts** a claim, even though the property is in the actual possession of a third person who asserts ownership thereof upon a most substantial basis and who is not subject to the territorial jurisdiction of the court.

It would require plain language to lead the Court to the conclusion that Congress intended to permit such a result. In the present economic development of our country, operations in many states are carried on by large corporations with their principal places of business on the Atlantic seaboard. If the view contended for were to prevail, then in every controversy with such a corporation, adverse claimants in possession of property situated in Louisiana or California, for example, would be required to litigate in a remote bankruptcy court, at great expense, issues of local law which, except for the intervention of bankruptcy reorganization proceedings, would necessarily have to be tried in the courts of the States where the property is located or the adverse claimants reside. It is difficult to suppose that a national legislature composed of representatives from all sections of the country would have sanctioned such a result, by which, in effect, the residence of the plaintiff would be substituted for that of the defendant, or for the situs of the property, as the test of venue.

No such result is justified by the language of the sections of the law upon which the Trustee relies. These

[3]These provisions were originally enacted in 1934 as Sections 77A and 77B of the Bankruptcy Act (48 Stat. 912, 11 U.S.C. 206-7). In 1938 the Bankruptcy Act was amended and these sections were incorporated in Chapter X of the Bankruptcy Act, which now appears as 11 U.S.C. 501-676.

are Sections 102 and 111 of Chapter X which we now discuss in inverse order:

Nothing in Section 111 of Chapter X Supports Jurisdiction in This Case.

Section 111 of the Bankruptcy Act reads as follows:

> "Section 111—Where not inconsistent with the provisions of this chapter, the court in which a petition is filed shall, for the purposes of this chapter, have exclusive jurisdiction of the debtor and its property, wherever located." (11 U.S.C. 511).

It will be noted that the jurisdiction conferred by Section 111 over the property of the debtor wherever situated is conferred upon the bankruptcy court only **"for the purposes of this chapter"**, i.e., for the purposes of consummating a reorganization.[4]

This provision as to jurisdiction was inserted only to make it plain that the reorganization might include property outside the judicial district without the necessity of ancillary proceedings,[5] **where there was no controversy as to whether the debtor owned the property.** See Gerdes on Corporate Reorganizations (1935), pages 1351-1354.[6]

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[4]This provision was not new in Chapter X; it appeared in Section 77B; see 11 U.S.C. 207 (a).

[5]The qualifying phrase **"for the purposes of this chapter"** in Section 111 becomes the more significant when it is noted that Chapter X contains elaborate provisions as to proceedings for the adjustment of rights as between the debtor and its creditors and stockholders, and no such provision as to controversies over property or property rights between the debtor and an adverse claimant in possession.

[6]"The reorganization court therefore has practically complete and paramount jurisdiction in so far as the debtor and its property are concerned. But country-wide control over the debtor and its property does not necessarily carry with it jurisdiction over persons against whom the debtor or its trustee may assert a claim, even if such persons are in possession of property claimed to belong to the debtor or its trustee. In so far as jurisdiction over persons other than the debtor or parties to the proceedings are concerned, the jurisdiction of the court in a proceeding under Section 77B would seem to be confined to its territorial limits. * * *" See Gerdes, *op. cit.*, pages 1353-1354.

It was not intended to give the bankruptcy court jurisdiction to try the title to property not in the actual or constructive possession of the corporation to be reorganized, but in the adverse possession of another who claims that he, and not the corporation to be reorganized, owns it; see Gerdes, *op. cit.*, page 1480:

> "The provision of Section 77B granting the court exclusive jurisdiction over the debtor's property is inapplicable where the controversy revolves around the question whether the property is that of the debtor. **Until that question is determined, the court's exclusive jurisdiction does not attach.**"

That Section 111 did not give the bankruptcy court the unlimited jurisdiction for which the Trustee contends is clearly indicated by the decisions of this Court in *Continental Illinois National Bank & Trust Co. v. Chicago, Rock Island & Pacific Ry. Co.*, 294 U. S. 648 (1935), and *Thompson, Trustee v. Magnolia Petroleum Co.*, 309 U. S. 478 (1940), both of which cases were cited and discussed by the Circuit Court of Appeals in its opinion below (122 F. (2d) 232, 238, 239). These cases arose under Section 77 of the Bankruptcy Act relating to railroad reorganizations (11 U.S.C. 205), which contains language identical with the language now appearing in Section 111 of Chapter X to the effect that a reorganization court shall, during the pendency of the proceedings and for the purposes thereof, "have exclusive jurisdiction of the debtor and its property, wherever located."

In the *Rock Island* case (294 U. S. 648), the Court was careful to point out that it was doing "no more than suspend the enforcement" of a lien on property admittedly the debtor's and that it was **not trying title** to property adversely held:

"It is next contended that the court was without power to issue the injunction in a summary proceeding. **Obviously, an application for an injunction against the immediate enforcement of a remedy is not the assertion of an adverse claim.** The bonds deposited as collateral were not in the hands of purchasers, but in the hands of creditors as security. That the equity which the debtor retained was a property interest, was not and could not be disputed by the creditors; nor was the claim of the creditors in respect of their rights in the collateral security or the rank of their liens questioned by the debtor. **In short, no adverse claim was brought forward by either of the parties to the controversy.** The only question was in respect of the creditors' remedy; and the sole point is as to the authority of the bankruptcy court to delay for a reasonable time an interference with the reorganization proceeding which would result from an immediate sale of the collateral." (294 U. S. 648, 681).

In the *Magnolia* case (309 U. S. 478), unlike the *Rock Island* case, an issue of title was involved, there being an adverse claim of ownership. Yet in the *Magnolia* case the Court expressly declared that jurisdiction depended upon possession,[7] not title:

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[7]While the legal principle laid down in the *Magnolia* case, *supra*, is decisive on the point that possession is the test of jurisdiction, the facts in the *Magnolia* case differ sharply from the facts in this case.

In the *Magnolia* case, up to the time of the bankruptcy proceeding, no one was in possession of the mineral rights by the exercise thereof because no well had been drilled upon the property; the only possession of any sort was that of the surface, which was used by the debtor and the trustee for railroad purposes. In order to prevent drainage of oil from the property claimed by the trustee through oil wells already drilled on adjacent property, the trustee was authorized to drill on the property which he was occupying for railroad purposes, and it was ordered that the proceeds be impounded.

In our case, at the time of the institution of the reorganization proceedings, the mineral rights were, and had been for many years, in the undisturbed exclusive possession of the respondent oil companies and sulphur company, and many oil and sulphur wells had been drilled by them without any pretense being made that the Debtor would have any legal right to question these operations.

These differences were carefully noted by the Circuit Court of Appeals; see footnote, pages 238-239 of 122 F. (2d).

> "Bankruptcy courts have summary jurisdiction to adjudicate controversies relating to property over which they have actual or constructive possession. And **the test of this jurisdiction is not title in but possession** by the bankrupt at the time of the filing of the petition in bankruptcy." (309 U. S. 478, 481).

It thus appears that this Court in both the *Magnolia* and the *Rock Island* cases has already clearly indicated that language corresponding to the language of Section 111 of Chapter X does not change the test of jurisdiction in the bankruptcy court from possession to property interest as the petitioner contends.[8]

Nothing in Section 102 of Chapter X Supports Jurisdiction in this Case.

Section 102 of the Bankruptcy Act reads:

> "Section 102—The provisions of chapters I to VII, inclusive, of this Act shall, insofar as they are not inconsistent or in conflict with the provisions of this chapter, apply in proceedings under

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[8]The decision in the *Magnolia* case shows that possession remains the test of summary jurisdiction against adverse claimants even in a case where the statute contains an express provision for nationwide service of process (as it does not in the present case). In railroad reorganization cases express provision for nationwide service of process was made by the amendment of August 27, 1935 (11 U.S.C. 205 (a)). There is no corresponding provision in Chapter X and there was none in Section 77B. The *Magnolia* case shows that even in railroad reorganization cases an express provision for nationwide service does not enlarge summary jurisdiction but is applicable merely in a case where the court would otherwise have such jurisdiction, i.e., where the property is admittedly the debtor's property and not in the possession of one having a substantial adverse claim thereto.

This was recognized by the Court of Appeals when it said:

> "Neither exclusive jurisdiction of the debtor **nor power to issue process outside the district** confers upon the bankruptcy court the power, in a summary proceeding, to decide, without the consent of an adverse claimant, a controversy concerning property in his possession, unless his claim be merely colorable. Were it otherwise, every bona fide possessor of property held adversely to a bankrupt could be haled into a distant Federal Court to defend his right to the property whenever the trustee in a reorganization proceeding should choose to corral him summarily." (122 F. (2d) 232, 239).

this chapter: *Provided, however,* That section 23, subdivisions h and n of section 57, section 64, and subdivision f of section 70, shall not apply in such proceedings unless an order shall be entered directing that bankruptcy be proceeded with pursuant to the provisions of chapters I to VII, inclusive. * * * " (11 U.S.C. 502).[9]

Petitioner contends that jurisdiction in this case is supported by the provision in Section 102 that Section 23 of the Bankruptcy Act shall not apply to proceedings under Chapter X. This contention also will not survive examination.

The abrogation of Section 23 of the Bankruptcy Act contained in Section 102 did not enlarge the **summary** jurisdiction of the bankruptcy court. The only effect which it had upon the **plenary** jurisdiction of the bankruptcy court was to make it plain that suits might be maintained in that court **against defendants subject to suit in the district,** without requirement of diversity of citizenship and jurisdictional amount; **it did not enlarge the territorial jurisdiction of the bankruptcy court.**

The sole purpose of the provision in Chapter X that Section 23 should ordinarily not apply to proceedings thereunder, was to make it clear that a bankruptcy court sitting in a reorganization proceeding should have all the powers formerly exercised by an equity court in receivership proceedings so that jurisdictional requirements with respect to diversity of citizenship and amount involved would not be applicable. There was no intention to give a bankruptcy reorganization court more extensive powers than a court of equity would have, by permitting process

[9]In 11 U.S.C. 502 the references to section numbers in the Bankruptcy Act are changed to the section numbers as they appear in the U. S. Code. Thus Sections 23, 57, 64 and 70 of the Bankruptcy Act become Sections 46, 93, 104 and 110 respectively of the U. S. Code.

of the bankruptcy court to run throughout the nation, which is the result for which the petitioner here contends.

This is clear from a consideration of the legislative history of Section 102, our statement of which we condense as far as is consistent with reasonable clarity.

Section 77B of the Bankruptcy Act contained in paragraph (a) a provision that the bankruptcy court

> " * * * shall have and may exercise all the powers, not inconsistent with this section, which a Federal court would have had it appointed a receiver in equity of the property of the debtor by reason of its inability to pay its debts as they mature."[10]

It has long been well-settled that a federal equity court sitting in a receivership proceeding may entertain suits without regard to diversity of citizenship or amount in controversy; see *White v. Ewing*, 159 U. S. 36 (1895).[11] It was the intention of the framers of Section 77B of the Bankruptcy Act to give the bankruptcy reorganization court the same power (not anything more). However, after the enactment of Section 77B doubts were expressed as to whether this result had been accomplished in view of the fact that the Bankruptcy Act contained in Section 23 a provision that except in case of proceedings under Sections 60, 67 and 70, suits by a trustee should be brought only in the courts where the bankrupt might

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[10]11 U.S.C. 207 (a), 48 Stat. 912 (1934), as amended August 20 and 29, 1935. In the revision of 1938 this provision became Section 115 of Chapter X and now is 11 U.S.C. 515.

[11]No one ever suggested that this doctrine gave a federal equity court the power to extend its process extra-territorially throughout the nation. The contrary has been expressly held repeatedly. See *Barfield v. Zenith Tire & Rubber Co.*, 9 F. (2d) 204 (D.C.N.D. Ohio, 1924); *Bovay v. H. M. Byllesby & Co.*, 88 F. (2d) 990 (C.C.A. 5, 1937) at page 992; *United States v. Tacoma Oriental S.S. Co.*, 86 F. (2d) 363 (C.C.A. 9, 1936) at page 369; *In re Standard Gas & Electric Co., Hastings v. H. M. Byllesby & Co.*, 119 F. (2d) 658 (C.C.A. 3, 1941) at pages 664-665; compare *Thompson v. Terminal Shares, Inc.*, 104 F. (2d) 1 (C.C.A. 8, 1939), certiorari denied 306 U. S. 652.

have brought them unless by consent of the defendant.[12] It was for the purpose of removing this point from doubt and **for no other purpose** that in the 1938 revision of the bankruptcy law there was written into Section 102 of Chapter X a provision that ordinarily Section 23 should not apply to proceedings thereunder.

As reported by the House Judiciary Committee and adopted by the House, Section 102 contained no express exclusion of Section 23.[13] The express exclusion of Section 23 was proposed by the Senate Judiciary Committee at the suggestion of Professor John Gerdes. Professor Gerdes was of the view that Section 23 was already inapplicable under Section 77B, but, in view of the doubts which had been expressed on this point, thought that it should be put beyond controversy.[14]

The hearings before the subcommittee of the Committee on the Judiciary of the United States Senate (75th

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[12]Section 102 was derived from subdivision (k) of Section 77B; see Bankruptcy Act of 1938 As Amended, With Annotations by John Hanna and James Angell McLaughlin (1938), page 122; Weinstein, Bankruptcy Law of 1938, page 193.

Prior to the revision of 1938, subdivision (k) had provided that certain enumerated sections of the bankruptcy law should not apply to reorganization proceedings. The sections thus enumerated did not include Section 23. Although there was a general provision to the effect that provisions of the Bankruptcy Act inconsistent with the provisions of Section 77B should not be applicable to proceedings under Section 77B, there was a difference of opinion as to whether Section 23 would be excluded by this general reference, i.e., as to whether Section 23 would be considered inconsistent with provisions of Section 77B. It was to remove this doubt, as noted in the text, that in the 1938 revision Section 23 was expressly included in the enumeration in Section 102 of sections of the Bankruptcy Act which would not apply in reorganization proceedings.

[13]House Reports, 75th Congress, First Session, Report 1409, page 97.

The hearings referred to on page 29 of petitioner's brief have nothing whatsoever to do with Section 102 of the Chandler Act as finally adopted. The hearings referred to took place on June 4, 1937. At that time Section 102 of Chapter X, as then under consideration by the House Committee, did not specifically exclude Section. 23. The Act passed the House on August 10, 1937, but was substantially amended in the Senate where it was not passed until June 10, 1938, being finally approved on June 22, 1938, 52 Stat. 840, c. 575.

[14]See footnote 15, *infra*, page 16.

Congress, Second Session, H. R. 8046, page 77) contain the following illuminating statement:

> "Mr. Gerdes. Chapter X is not intended to be self-sufficient. All provisions of the general bankruptcy act are applicable to proceedings under chapter X, except such provisions are inconsistent with express provisions in chapter X. Some provisions of the general act are clearly inconsistent with the corporate reorganization provisions and are therefore inapplicable. Other provisions are clearly applicable. **However, there are certain sections which by their nature permit of doubt as to whether or not they are applicable.** * * *
>
> "In this enumeration of sections and subsections which are not applicable, we include only those as to which there may be reasonable doubt.[15] The sections which we enumerate are 23, 57 (h), 57 (n), 64, and 70 (f). We propose that section 102 be amended to provide that these sections and subsections shall not be applicable to proceedings under chapter X."

And again at page 82:

> "Mr. Gerdes * * * Under 77B, certain sections of the general Bankruptcy Act were expressly stated to be inapplicable to proceedings under the section. That was eliminated in this pending bill. We are now seeking to insert a provision similar to that in 77B, so there may not be any doubt as to whether they are applicable or not. **We are simply carrying into this bill certain provisions which already exist in 77B."**

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[15]As just noted, Professor Gerdes was of the view that Section 23 was already inapplicable under Section 77B, and he was proposing to make a specific reference to it solely to remove any opportunity for doubt. Compare Gerdes on Corporate Reorganizations (1935), pages 1464, 1465, 1478, with Gerdes "Corporate Reorganization: Changes Effected by Chapter X of the Bankruptcy Act", 52 Harvard Law Review (1938) 1, at page 21, note 117. No one ever had any idea at any time that the abrogation of Section 23 changed the basis of summary jurisdiction or gave the bankruptcy court extra-territorial jurisdiction over persons or over property not in the possession of the debtor.

There were no discussions of the proposed amendment to Section 102 other than those herein cited. If Congress had intended any far-reaching and radical change in the character of jurisdiction of the bankruptcy court, it is not conceivable that such change would have been effected without discussion in committee reports and debate in Congress on the subject. The amendment proposed by Professor Gerdes was recommended by the Judiciary Committee in its report to the Senate (Report 1916, dated April 20, 1938, page 23), was adopted by the Senate without discussion (83 Congressional Record 8697), and was thereafter adopted by the House of Representatives without discussion (83 Congressional Record 9101-9110).

The foregoing analysis of the legislative background is confirmed by Mr. Weinstein, who played a leading part in drafting the Chandler Act and to whom the petitioner refers on page 29 of his brief.[16]

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[16]At page 193 of his "Bankruptcy Law of 1938" Mr. Weinstein says, concerning Section 102:

"This section has been derived from subd. k of sec. 77B, which enumerated certain sections that were to apply in the case of a liquidation, then provided that, with the exception of certain provisions of the enumerated sections, such enumerated sections were not to apply to the reorganization proceeding proper, and finally provided that all other provisions of the Act, except where inconsistent with the provisions of sec. 77B, were to apply to proceedings under that section, whether or not a liquidation order has been entered. This was an involved and confusing provision which has been simplified in the Chandler Act. Sec. 102 excepts from applicability to a reorganization proceeding proper certain specified undesirable provisions of the Act which might be applicable unless specifically excepted. Upon the entry of a bankruptcy order (sec. 208), all of the provisions of the Act, so far as possible and including the specified excepted provisions, become applicable.

"Sec. 23, which limits the jurisdiction of the bankruptcy court, provides that, as to suits by receivers or trustees, the jurisdiction shall be the same as if the bankrupt had sued and bankruptcy had not occurred. **However, a Federal equity receiver is not so restricted; he may sue in his own court regardless of the jurisdictional requirements of diversity of citizenship and amount ($3,000). By the elimination of sec. 23, the Federal equity rule becomes applicable** under this chapter if the judge invests the trustee with the rights and powers of an equity receiver, as provided in sec. 187."

The following conclusions are inevitable:

(a) Section 23 was expressly mentioned in Section 102 only to leave no room for doubt that the bankruptcy court should have the same jurisdiction with respect to plenary suits as a federal equity court would have in a receivership proceeding, thereby assuring the fulfilment of Section 115;

(b) There was no other reason for the express mention of Section 23 in Section 102, nor did it ever occur to anyone that the mention of Section 23 in Section 102 would enlarge in any way the summary jurisdiction of the bankruptcy court; and

(c) The exclusion of Section 23 did not give the bankruptcy court in a plenary proceeding more extensive jurisdiction than a federal equity receivership court would have, and therefore did not authorize the bankruptcy court to maintain a plenary proceeding by extraterritorial service of process.

At pages 29 and 30 of the petitioner's brief he refers to a colloquy in the hearings before the House Judiciary Committee which he contends indicates that Congress "deemed it preferable to require a citizen of Texas to come to Detroit to contest, in the reorganization court in Detroit, title to property located in Texas, than to go back to the old idea of ancillary receiverships and litigation throughout the country."

While it is, of course, true that Congress desired to eliminate ancillary receiverships, the claim of the petitioner that the colloquy referred to indicates an intention by Congress to permit a bankruptcy court to issue its process throughout the nation to try title to property not in the bankrupt's possession, is without foundation. This is obviously so because, as we have already pointed out,

the colloquy took place before a House Judiciary Committee which reported Section 102 without any provision for the express exclusion of Section 23, and yet it is upon that express exclusion that petitioner rests his argument.[17]

There is not a single statement or suggestion from any official source at any time even remotely supporting the argument that Congress intended to give a bankruptcy court in a reorganization proceeding extra-territorial jurisdiction to try title to property in the actual adverse possession of a third person asserting a serious claim of ownership. This Court and lower federal courts have repeatedly held that express and unmistakable language is required to authorize extra-territorial service of process; see *Robertson v. Railroad Labor Board*, 268 U. S. 619, 622, 627 (1925); *Graustein v. Rutland R. Co.*, 256 Fed. 409, 411 (D. C. D. Mass., 1919).

At page 26 of his brief, petitioner cites Finletter's Law of Bankruptcy Reorganization as apparently supporting his contention. The views of Professor Finletter are directly contrary, as shown by the statement at page 178 of his work:

> "* * * The complete power of the court to issue nationwide service for all purposes would mean that persons who held property under a bona fide claim of right would be obliged to defend that right in a court **far distant from the location of the property and the witnesses.** Since Section 23b is not applicable to proceedings under Chapter X **this would**

[17]Moreover, an examination of the colloquy will show that the complaints which were expressed in letters written to the Committee were cases where the bankruptcy court had properly exercised jurisdiction because the bankrupt had possession; compare *Ex parte Baldwin*, 291 U.S. 610 (1934); *Chandler v. Perry*, 74 F. (2d) 371 (C.C.A. 5, 1934). The complaints presented with respect to these cases received no consideration from the House Committee or from Congress, which desired to make no change in the jurisdiction of the bankruptcy court where there was **possession** of the *res*. This does not afford the slightest basis for the suggestion that Congress intended the bankruptcy court to have jurisdiction where there was no possession.

> **mean that every suit to which a trustee appointed under that chapter is a party could have its venue in the reorganization court, even though the defendant be a resident of and the property which is the subject of the litigation be situated in a far distant state.** Even under Chapters XI and XII, where Section 23 is applicable, suits for the recovery of property from bona fide adverse claimants under Sections 60, 67 and 70, which are excepted from the provisions of Section 23b, could have their venue in the reorganization court regardless of the location of the property or the residence of the defendant if extra-territorial service were permitted. **It is believed that it is not sound to find that Chapters X, XI and XII by implication effect such a departure from standard practice."**

In the present case the District Court undertook to do in a **summary** proceeding just what Professor Finletter concluded Congress could not have intended to permit even in a plenary suit, namely, by a nationwide service of process, to require the respondents to defend in a court **"far distant from the location of the property and the witnesses"** their right to property held under a bona fide claim of right.

The other leading writers on Chapter X of the Bankruptcy Act take the same view as that indicated by Professor Finletter; see Moore's Bankruptcy Manual (1939), pages 497-498, and the works of Professor Gerdes and Mr. Weinstein which we have already cited.

Since 1910 certain cases arising under Sections 60, 67 and 70 of the Bankruptcy Act have been expressly excepted from the application of Section 23. But we have searched in vain for a single case arising since 1910—more than thirty years—in which it has been even contended, much less held, that the abrogation of Section 23 as to cases arising under these Sections gave any power

to a bankruptcy court to exercise extra-territorial jurisdiction over persons and property not subject to its process. What basis is there for a contention that the abrogation of Section 23 as to cases arising under Chapter X gives the bankruptcy court extra-territorial jurisdiction which has never been held to exist in cases arising under Sections 60, 67 and 70, as to which Section 23 has been abrogated since 1910?

As the Court of Appeals declared in its opinion,

> "No such unreasonable election may be deduced from the language of the statute, or from the authorities which have been considered."[18] (122 F. (2d) 232, 239).

While the District Court Was Without Jurisdiction to Maintain Even a Plenary Proceeding by Extra-territorial Service of Process, Actually the Proceeding Was Summary.

The proceeding was summary. It was repeatedly so denominated by the petitioner Trustee, who also procured the District Court to so characterize it in its conclusions of law (R. I-307, 329, 330; V-2512). The Circuit Court of Appeals also found the proceeding to be summary (122 F. (2d) 232, 234). The proceeding was brought upon the theory that it could not be maintained except as a summary proceeding and by proof that the property in controversy was in the possession of the Debtor. It was only afterwards that the petitioner shifted his position to the present contention that the proceeding was not

[18] As noted *supra*, page 12, the Court pointed out:
"* * * Were it otherwise, every bona fide possessor of property held adversely to a bankrupt could be haled into a distant Federal Court to defend his right to the property whenever the trustee in a reorganization proceeding should choose to corral him summarily." (122 F. (2d) 232, 239).

summary and that possession of the Debtor was not essential.

The proceeding was instituted by a rule to show cause upon a petition drafted in the most general terms, and the respondents were cited summarily to appear. The proceeding did not lose its character as summary because the District Court was compelled by constitutional requirements to allow respondents a fair hearing upon the summary proceeding; see *In re Prima Co.*, 98 F. (2d) 952 (C.C.A. 7, 1938), certiorari denied 305 U. S. 658, where the Court said at page 957:

> "* * *Appellees, however, contend that, although the proceeding was summary in character, it was in fact a plenary action, inasmuch as all the evidence which could have been heard in a plenary action was heard. Such fact we think is not always determinative of the question. It would seem that if the hearing were plenary, the judgment should have been plenary and not summary in its character. Here, however, there was a summary judgment requiring payment forthwith, and upon default appellants would be subject to penalty for contempt. Under these circumstances we think the proceedings were in fact summary rather than plenary."

See also *In re Midtown Contracting Co.*, 243 Fed. 56, 60 (C.C.A. 2, 1917), certiorari denied 245 U. S. 654.

In support of his present contention that the proceeding below was not summary petitioner relies upon *Board of Trade of City of Chicago v. Johnson*, 283 Fed. 374 (C.C.A. 7, 1922). Certiorari was granted in that case by this Court, which in its opinion repeatedly characterized the proceeding as a summary one (264 U. S. 1, 6, 14). The Court devoted ten pages of opinion to an analysis of whether the bankrupt had possession and whether there

was accordingly jurisdiction to determine the issues in a summary proceeding. Manifestly, the Court would never have engaged in an extensive inquiry of this character if it could have given the short answer that the form of the action was plenary. This decision is, therefore, a rejection by this Court of the theory for which the Trustee contends.

All the other cases cited by the petitioner are cases where the respondents failed to make formal objection or, indeed, affirmatively urged the court to proceed summarily; see, for example, *In re Rockford Produce & Sales Co.*, 275 Fed. 811, 813 (C.C.A. 7, 1921). Such cases have no application here, where the respondents have at all times strenuously resisted the assertion of summary jurisdiction.

The Trustee has been unable to produce a single case where a respondent in possession under a substantial adverse claim made timely objection to a summary proceeding and the court nevertheless held that he could not be heard to object because he had been granted an opportunity to be heard, as the Constitution requires that he should be. We are satisfied that no such case exists.

It is, however, really immaterial whether the proceeding below is to be characterized as summary or plenary. Even if it could be properly characterized as plenary, petitioner's jurisdictional difficulties would still remain and the District Court had no jurisdiction to entertain it. Stating the argument in other words, (a) the proceeding here involved was in fact summary and cannot be maintained where the property in controversy is in the possession of a third person under a substantial claim of ownership; (b) if the proceeding could be characterized as not summary but plenary, the bankruptcy court was without jurisdiction to maintain it as to prop-

erty outside the district in the possession of a defendant also outside the district and asserting ownership under a substantial claim; Congress never intended to give a bankruptcy reorganization court the extraordinary power to try cases against non-resident defendants involving title to property not in the bankrupt's possession.

The Opinion of the Circuit Court of Appeals Does Not Conflict With Any Other Decisions.

The petitioner assigns as a reason for the granting of writs of certiorari that the decision of the Sixth Circuit Court of Appeals conflicts with the decision of this Court in the *Rock Island* and *Magnolia* cases and with the decision of the Fourth Circuit Court of Appeals in *Warder v. Brady*, 115 F. (2d) 89 (C.C.A. 4, 1940).

We have already fully discussed the decisions of this Court in the *Rock Island* and *Magnolia* cases (*supra*, pages 10-12), and pointed out the clear distinction between the factual situations presented in those cases and the situation presented in this case. In the *Rock Island* case there was no controversy as to ownership of the property involved, as there is here; there were no adverse claimants. In the *Magnolia* case the Court declared that possession was the test, as the Sixth Circuit Court of Appeals held in the instant case.

The petitioner's contention that the decision of the Sixth Circuit Court of Appeals conflicts with *Warder v. Brady* is equally unfounded. The petitioner alleges (page 16 of his brief) that in the cited case the Fourth Circuit Court of Appeals held that possession was no longer the test of jurisdiction in corporate reorganization proceedings, and that all suits to which the Trustee was a party could be instituted in the bankruptcy court against ad-

verse claimants, without regard to possession. An examination of the case will show that these contentions are specious. The facts in the case were as follows:

A receiver appointed by a State court for a coal mining corporation operated the mines for several years and collected certain funds which he earmarked for the payment of amounts due bondholders. A trustee appointed in reorganization proceedings under Chapter X filed a summary proceeding in the federal district court, praying for an order directing the State court receiver to turn over these funds. The amount in controversy was less than $3,000 and there was no diversity of citizenship. The district court maintained its jurisdiction over the summary proceeding and entered a turn-over order. On appeal this judgment was reversed. The Circuit Court of Appeals expressly held that there was **no jurisdiction to maintain a summary proceeding,** although the trustee had been appointed under a Chapter X proceeding, because the property was in the possession of an adverse claimant (since the receiver was holding the money for the benefit of bondholders and not for the debtor).

Petitioner quotes (pages 28 and 29 of his brief) the statement of the Fourth Circuit Court of Appeals to the effect that "the bankruptcy court under Ch. X has jurisdiction to entertain all suits to which its trustee or the debtor in possession is a party, even though they be instituted against adverse claimants." In making this statement, the Court was simply recognizing that Section 23 was not applicable under Chapter X and that therefore a **plenary** proceeding could be maintained in the bankruptcy court without regard to diversity of citizenship or amount in controversy, **where the defendant was subject to service of process within the jurisdiction** (which is not the case here). Nothing in the statement indicates any

view of the Court upholding extra-territorial service of process in a plenary proceeding. Moreover, nothing in the statement supports the contention that the Court would have sanctioned any enlargement of summary jurisdiction, for immediately following the quoted language the Court made the following statement (which the petitioner omits from his quotation):

> "It **does not follow,** however, that the jurisdiction of the bankruptcy court over suits against an adverse claimant may be summarily exercised. The statute does not so provide; and under the well established procedural rule of the ordinary bankruptcy courts, as we have seen, suits by a trustee to recover property from an adverse claimant in possession must take the form of a plenary action. This is especially true when the title to property is in dispute. * * * " (115 F. (2d) 89, 94).

On this point, therefore, there is no conflict between *Warder v. Brady* and the decision of the Sixth Circuit Court of Appeals in the present case.

Petitioner also quotes (page 28 of his brief) the statement of the Fourth Circuit Court of Appeals in *Warder v. Brady* to the effect that "the summary power of the court extends to all of the debtor's property that can be affected by a plan, whether or not the property is in his possession." This statement is simply a recognition of the general rule, enunciated in the *Rock Island* case, that the reorganization court has exclusive jurisdiction of the **property of the debtor—not** of property merely **claimed** by the debtor and held adversely by third persons who deny the debtor's claims and allege, with a substantial basis, that in truth they are the owners. The quoted language affords no support whatever for the contention that the Fourth Circuit Court intended to

announce an enlargement of the summary jurisdiction of the bankruptcy court so as to include property adversely held; on the contrary, the language quoted is followed immediately by a discussion of the *Rock Island* case and by the specific statement that

> " * * * The propriety of a summary rather than a plenary proceeding was sustained **because an adverse claim to the property was not involved.**" (115 F. (2d) 89, 95).

On this point, likewise, there is no conflict between *Warder v. Brady* and the decision of the Sixth Circuit Court of Appeals in the present case.

Not only is there no conflict between *Warder v. Brady* and the decision in the instant case, but in fact the decisions are in entire accord because both cases denied the bankruptcy court the right to maintain summary jurisdiction against an adverse claimant in possession. The Fourth Circuit's conclusion on the very point now under discussion was expressed by it in the following language:

> "The pending case grows out of a reorganization proceeding under Ch. X and must be decided accordingly. The procedure is determined by the admitted facts that **the fund is in the possession of an adverse holder, and the title of the fund is in dispute.** If the contention of the special receiver is sustained, the reorganization court will have no interest in the fund, since in such event it will constitute no part of the debtor's estate. **It follows that recovery of the fund may be sought only in a plenary suit.**" (115 F. (2d) 89, 95).

This is precisely what the Sixth Circuit Court of Appeals held in our case. **There is no support either in the authorities or in reason for the contention that in a**

Chapter X proceeding the test of summary jurisdiction is title and not possession. Nor is there any support for the contention that in a **plenary** suit against third persons by a Trustee appointed in a Chapter X proceeding jurisdiction may be **extra-territorially** exercised.

At page 35 of his brief, petitioner contends that there is "a wide-open split and a conflict" in cited decisions of the Courts of Appeals as to the validity of extra-territorial service of process in suits in bankruptcy courts to recover property held adversely. This is not so. If the contention were well founded this Court would undoubtedly before now have granted writs of review to resolve the alleged conflict. But except in one instance it apparently never even occurred to the unsuccessful parties in the later cases cited by the present petitioner that they were entitled to obtain from this Court a writ of review.[19] In the one case in which a writ was applied for, the Court refused it.[20]

Moreover, an analysis of the cited cases shows that they in fact presented no conflict. The *Greyling* and *Prudence* cases[21] were cases in which the **debtor's property was undisputed,** and consequently the court had jurisdiction thereof by virtue of the provision in Section 77B giving exclusive jurisdiction of the property of the debtor wherever located. In the *Greyling* case the defendants were receivers of the debtor's property appointed by the State court and, therefore, of course, were holding the property for the debtor and not adversely.

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[19]A conflict of opinion in the lower federal courts is, of course, a special ground for the allowance of a writ under Rule 38.

[20]See *Keig, Trustee v. Harris Trust & Savings Bank* and *Keig, Trustee v. First National Bank*, 305 U. S. 658 (1938), denying petition for a writ of certiorari to review the decision of the Seventh Circuit Court of Appeals in *In re Prima Co.*, 98 F. (2d) 952 (C.C.A. 7, 1938).

[21]74 F. (2d) 734 and 75 F. (2d) 262.

The *Prudence* case, like the *Rock Island* case (294 U. S. 648), was one restraining the action of a pledgee of the debtor's property.[22]

Nothing in the later cases cited on page 35 of petitioner's brief is in conflict with these decisions. The facts in the later cases were widely dissimilar. All of the later cases involved attempts by a trustee appointed in reorganization proceedings to maintain, upon extra-territorial service of process, a suit *in personam* against defendants not within the jurisdiction. In all of these cases this attempt properly failed.[23] The complete lack of basis for the suggestion that these cases conflict in any way with the earlier cases is illustrated by the fact that in two of the later cases reference was actually made to the decision in the *Prudence* case, which was cited and quoted with approval.[24]

Respondents' Possession Is Not Open to Doubt.

The facts as to possession are, for present purposes, adequately summarized in the opinion of the Court of Appeals, which properly concluded:

> "The actual possession by appellants of their mineral servitudes by the active exercise thereof has been abundantly shown by evidence of record." (122 F. (2d) 232, 242).

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[22]In the *Prudence* case the Court of Appeals for the Second Circuit said:

> "* * * The order at bar is merely ancillary to such a possibility; **to preserve the pledge pendente lite;** * * *" (75 F. (2d) 262, 264).

[23]See *United States v. Tacoma Oriental S.S. Co.*, 86 F. (2d) 363 (C.C.A. 9, 1936); *Bovay v. H. M. Byllesby & Co.*, 88 F. (2d) 990 (C.C.A. 5, 1937); *In re Prima Co.*, 98 F. (2d) 952 (C.C.A. 7, 1938), certiorari denied 305 U. S. 658; *In re Standard Gas & Electric Co., Hastings v. H. M. Byllesby & Co.*, 119 F. (2d) 658 (C.C.A. 3, 1941). To the same effect is *Thompson v. Terminal Shares, Inc.*, 104 F. (2d) 1 (C.C.A. 8, 1939), certiorari denied 306 U. S. 652.

[24]See *United States v. Tacoma Oriental S.S. Co.*, 86 F. (2d) 363, 368; *In re Prima Co.*, 98 F. (2d) 952, 958.

The respondents have been in possession continuously since 1928, **more than ten years before the institution of the summary proceedings herein.**[25] In the course of the operations which the District Court in Michigan undertook summarily to enjoin, respondents had, over a period of **years** up to January 1, 1940, drilled 117 sulphur wells and 12 producing oil wells, made an investment of more than $6,000,000, produced large quantities of sulphur and oil, and employed several hundred men (R. II-817, 858, 865-66, 925).

This possession was obviously of the most open and notorious character. It was also exclusive. The Debtor was entirely familiar with respondents' possession, acquiesced in it, never undertook any mineral operations of its own, never attempted in any way to interfere with the operations of respondents before the present proceeding began in 1938. On the contrary, the Debtor by repeated declarations and legal proceedings in Louisiana recognized the right of respondents to conduct their mineral operations, limiting itself to a demand for royalties (R. IV-1641, 1934, 1607-8, 1959).

In such a situation what possible basis could fairly be put forward to require these respondents to litigate in a federal court in Michigan their title to the mineral rights which they have for so long exercised without question?

Petitioner says in his brief at page 38 that this Court has indicated by its decisions in the *Magnolia* case (309 U. S. 478) (1940) and in *Warren v. Palmer* (310 U. S. 132) (1940):

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[25]The first explorations for oil were in 1928; the first oil well was drilled in 1929; the first oil production was obtained in 1931. Sulphur explorations were conducted in 1932 and the first producing wells were brought in in 1933 (R. III-1024, 1166; II-814-17, 854, 865).

> "that in corporate reorganizations it is concerned with realistic and not fictitious possession."

We entirely agree with this test of possession. Indeed it is we who first advanced it in argument below, citing the decision of the Second Circuit Court of Appeals in *Palmer v. Warren*, 108 F. (2d) 164 (C.C.A. 2, 1939), affirmed 310 U. S. 132, where the Court said:

> "* * * Moreover, we can attach no meaning whatever to the 'possession' of a legal interest in a thing, except as it means **possession of the thing as an object of nature.** The reason lying back of the whole doctrine is **practical** rather than conceptual, as appears very plainly when the dispute concerns the right to possession. * * * " (108 F. (2d) 164, 166).

Upon a realistic basis who could have any doubt as to who was in actual, physical, open, notorious possession of the property in controversy here? The respondents, who have spent millions of dollars in conspicuous physical works, who have carried on operations for over ten years upon the property, employing hundreds of men? Or the petitioner and the Debtor, who have never made the slightest attempt to institute any mineral operations upon the property or, prior to the commencement of these proceedings, to restrain the operations of the respondents thereon?

Under Louisiana law it is well established that the mineral rights in controversy here are susceptible of separate ownership and possession, apart from the ownership and possession of the surface; that such rights are possessed by the exercise thereof through the extraction of minerals; and that such possession is adverse to any person, including the owner of the surface, who asserts an adverse claim to the mineral rights. These proposi-

tions are fully supported by the Louisiana cases which are discussed in the opinion of the Circuit Court of Appeals; see *Connell v. Muslow Oil Co., Inc.*, 186 La. 491 (1937), and other Louisiana cases cited in the opinion of the Court. None of the Louisiana cases were referred to by the District Court, although they were all called to its attention in briefs and in oral argument.

While the fact is without controlling legal significance in the disposition of the present application for certiorari, the Debtor was not even in possession of the surface of the area in controversy here because the surface is under lease for 99 years to the respondent Freeport Sulphur Company, which is in actual possession thereof.[26] Even in a controversy over the surface, it is believed that the actual realistic possession of the lessee would control in determining bankruptcy jurisdiction; compare *Warren v. Palmer*, 310 U. S. 132 (1940), affirming *Palmer v. Warren*, 108 F. (2d) 164 (C.C.A. 2, 1939). The lessee's independent possession and his right to defend the same in opposition to the lessor in a controversy over the exercise of rights in the property is recognized by Louisiana law; see Louisiana Civil Code, Article 2692; *State ex rel. Jennings-Haywood Oil Syndicate v. De Baillon*, 113 La. 572 (1904), cited with approval and followed in *Pan American Production Co. v. United Lands Co.*, 96 F. (2d) 26 (C.C.A. 5, 1938).

The Court of Appeals Properly Rejected the Findings of the District Court in Deciding the Jurisdictional Issues.

There are several answers to the petitioner's contention that this Court should grant certiorari because the

[26]The Record shows that no representative of the Debtor has even set foot on the property since April, 1932 (R. II-600-1, 618).

requirements of Rule 52 (a) of the Federal Rules of Civil Procedure were violated through "the complete disregard by the Court of Appeals in the instant case of the findings of fact of the Trial Court."

It may be pointed out again that the District Court wrote no opinion. The findings of fact were written by counsel for the Trustee.[27] The record abounds in other indications of the extraordinary attitude of the Trial Court.[28]

Rule 52 of the Federal Rules of Civil Procedure with respect to the setting aside of findings of fact only where they are clearly erroneous is based upon the court's proximity to the trial and the opportunity afforded thereby to judge the credibility of witnesses whose statements are not in accord; see Moore's Federal Practice (1938), page 3118, note 6. In the present case the great bulk of the record is made up of documentary evidence. A number of the witnesses testified by depositions. Only twelve witnesses testified in the courtroom, some of them very briefly, six not being cross-examined. The defects in the findings of fact adopted by the District Court were not due to failure of the Court properly to resolve con-

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[27]There are 85 paragraphs in the findings of fact and conclusions. Except for paragraph 1 of the findings and paragraph 17 of the conclusions and purely formal changes in two other paragraphs, every single paragraph in the findings of fact and conclusions of law submitted by the Trustee was taken *verbatim*. Pertinent are the observations of the court in *Process Engineers, Inc. v. Container Corporation of America*, 70 F. (2d) 487 (C.C.A. 7, 1934).

In the present case, in adopting literally the findings and conclusions submitted by the Trustee, the District Court made some findings which even counsel for the Trustee found to be erroneous and which they procured the Court to amend (R. I-344-49).

[28]See, e.g., R. V-2514-16; II-715-16, 772-80; III-1054, 1496. The jurisdictional motions of respondents (which the Circuit Court upheld) were, as the Circuit Court pointed out, "stigmatized as 'an attempt to use the courts to delay and hinder people from enforcing **their** property rights' " (122 F. (2d) 232, 244). The remarks of the District Judge fully provoked this characterization by the Circuit Court (R. V-2514-16).

flicts in testimony requiring a decision as to credibility of witnesses. The defects resulted from failure fully and clearly to state many facts and, in a few instances, from the making of statements directly opposed to the only evidence in the record on the point. The present is certainly no case for the granting of certiorari on the ground that the Circuit Court of Appeals improperly disregarded the District Court's findings of fact.

The fundamental error committed by the District Court was in entirely ignoring the Louisiana decisions—not only the case which settled Cockrell's power to lease **all** of the mineral rights here in controversy, *Mt. Forest Fur Farms of America, Inc. v. Cockrell*, 179 La. 795 (1934), but the decisions holding that persons extracting minerals are in possession of the right to extract such minerals.

The petitioner's claim (pages 40 and 41 of his brief) that certiorari should be granted because the decision of the Circuit Court of Appeals was based upon a disregard by that Court of the District Court's finding that the lease granted by Cockrell covered only 1/8th of the minerals, is also without force. That finding of the District Court was directly opposed to the decision of the Supreme Court of Louisiana in the case just cited. But it is quite incorrect to say that the Court of Appeals' decision was rested **solely** upon its finding that under the decision of the Supreme Court of Louisiana the lease granted by Cockrell covered the mineral interest claimed by the Debtor and that the respondents were in possession of the mineral rights under that lease. The **primary** basis for the decision of the Court of Appeals was its finding that the respondents were in independent possession of

the mineral rights. This finding was arrived at by the Court after an extended analysis of the Louisiana decisions recognizing the independent possession of mineral rights by the exercise thereof and after a full review of the indisputable facts in the record showing the existence of such possession in this case by the respondents; see 122 F. (2d) 232, 239-243. It was only after this discussion that the Court assigned the decision of the Supreme Court of Louisiana in the so-called bonus money suit as an **additional** ground for its conclusion, saying that the Trustee's contention

> "must be rejected for the **further** reason that the appellant sulphur company and the appellant oil companies are in possession of their mineral servitude, not under leases from the debtor corporation or its predecessor, but under mineral lease titles originating directly from Cockrell, direct vendor of the vendee who sold the land to the debtor. The right of Cockrell to execute the mineral leases 'in his own right, and not as agent for anyone' is res adjudicata. Mt. Forest Fur Farms of America v. Cockrell, 179 La. 795, 155 So. 228, 229, supra." (122 F. (2d) 232, 244).

There is no basis for petitioner's contention that the jurisdictional issues are necessarily involved with the merits. Summary jurisdiction was denied by the Court of Appeals because of its finding that the possession by the appellants of their mineral servitude had been openly adverse to the appellee landowner (122 F. (2d) 232, 243). This conclusion was independent of any finding upon the merits. It was based upon respondents' possession and upon the Louisiana decisions supporting such possession.

CONCLUSION

It would be difficult to imagine a case in which less argument for the maintenance of jurisdiction in the bankruptcy court in Michigan could be made than in the present case. The issues upon the merits relate solely to Louisiana mineral rights, which are immovable and local in their nature and must be controlled by Louisiana law. Even if the bankruptcy court had been entitled to exercise jurisdiction, it would have been its duty in the exercise of a proper discretion to stay the proceedings and refer the issues to the State courts of Louisiana for decision; see *Thompson, Trustee v. Magnolia Petroleum Co.*, 309 U. S. 478 (1940). The present is a stronger case for the application of the rule than the *Magnolia* case because of the peculiar character of the Louisiana jurisprudence, which is based upon the civil law; *cf.* the comment of Holmes, J. in *Black and White Taxicab and Transfer Company v. Brown and Yellow Taxicab and Transfer Company*, 276 U. S. 518, 533 (1928). In the instant case the District Court, in effect, undertook to ignore and set aside a decision of the Supreme Court of Louisiana involving the very mineral lease which is involved in this case; see *Mt. Forest Fur Farms of America, Inc. v. Cockrell*, 179 La. 795 (1934).

The attempt of the District Court to insist upon jurisdiction in this case is all the more extraordinary in view of the fact that there has been pending since 1936 in the Louisiana State courts a suit between all the parties to the present case, in which all of the issues open to the parties may be tried. The District Court not only insisted upon maintaining its jurisdiction and not only refused to refer the issues to the Louisiana State courts, but actually undertook to **prevent** the Louisiana State courts

from trying the issues by issuing its injunction against proceedings in the Louisiana suit.[29]

Upon the merits of the case the rights of the Debtor (and if reference to them is justified, the rights which its stockholders have through it)[30] are properly to be left to adjudication in the Louisiana courts to which the Debtor itself resorted. Until someone conceived the idea of putting the Debtor corporation, organized in Delaware and owing negligible debts, into a bankruptcy reorganization proceeding in Michigan, no one would ever have attempted to subject to the decision of any Michigan court, either federal or state, the claims here asserted against these respondents.[31]

It is, we submit, unthinkable that the reorganization provisions of the bankruptcy law permit a corporation resorting to reorganization to open to itself the doors of a remote bankruptcy court (not even sitting in the state of its incorporation) and thereby to require third persons who are not subject to the territorial jurisdiction

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[29]The position taken by the District Court may be compared with that of this Court in the cases of *City Company of New York, Inc. v. Stern* and *Chase Securities Corp. v. Vogel*, 312 U.S. 666 (1941). In the cited cases this Court held under consideration for several months applications for writs of certiorari from decisions of the Eighth Circuit Court of Appeals, while awaiting a decision of the Supreme Court of Minnesota upon a point of State law involved. When that decision came down, this Court granted certiorari and without argument reversed the judgments below, citing the decision of the Supreme Court of Minnesota.

How different was the position taken by the District Judge in this case when, instead of referring the parties to the State courts for decision upon the State law and instead of waiting for the decision of the State court in the litigation there pending, he undertook to prevent the State court from passing upon the issues of State law!

[30]Obviously the stockholders of the Debtor corporation could never have haled these respondents into a Michigan bankruptcy court to try the respondents' title to the property in controversy.

[31]There is no room for doubt that the State courts of Louisiana have jurisdiction in a proper proceeding to deal with all claims which the Debtor or the Trustee may be entitled to assert. Those courts alone would have had the power to deal with such claims if the reorganization proceedings had not been instituted and sought to be availed of to oust the State courts of jurisdiction.

of that court and who are (and long have been) in possession of property which they claim to own, situated a thousand miles away, to appear and litigate their substantial claims of ownership in the bankruptcy tribunal selected by the plaintiff.

We respectfully submit that the application for certiorari should be denied.

Respectfully submitted,

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December 17, 1941.

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FILED
DEC 31 1941
CHARLES ELMORE CROPLEY
CLERK

(4)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

Nos. 763-769

FRANK FITZGERALD, TRUSTEE FOR MT. FOREST FUR FARMS OF AMERICA, INC.,

Petitioner,

v.

GULF REFINING COMPANY OF LOUISIANA, GULF REFINING COMPANY, HUMBLE OIL AND REFINING COMPANY, SHELL OIL COMPANY, INC., FREEPORT SULPHUR COMPANY, and ERNEST COCKRELL, GULF REFINING COMPANY OF LOUISIANA, ET AL.,

Respondents.

No. 770

FRANK FITZGERALD, TRUSTEE FOR MT. FOREST FUR FARMS OF AMERICA, INC.,

Petitioner,

v.

ERNEST COCKRELL, HIS CURATOR AD HOC, BRUCE NUNEZ, AND THEIR ATTORNEYS, S. W. PLAUCHE, AND THE LAW FIRM OF HEROLD, COUSIN & HEROLD,

Respondents.

No. 771

FRANK FITZGERALD, TRUSTEE FOR MT. FOREST FUR FARMS OF AMERICA, INC., MORAN CORPORATION OF THE SOUTH AND ISAAC S. HELLER,

Petitioners,

v.

ERNEST COCKRELL, SIDNEY L. HEROLD, SUMTER P. COUSIN AND SAMUEL L. HEROLD; AND S. W. PLAUCHE AND S. W. PLAUCHE, JR., COMPOSING THE LAW FIRM OF PLAUCHE & PLAUCHE,

Respondents.

REPLY BRIEF ON BEHALF OF PETITIONERS

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

FRANK FITZGERALD, Trustee for Mt. Forest Fur Farms of America, Inc., *Petitioner,* v. GULF REFINING COMPANY OF LOUISIANA, et al., *Respondents.*	Nos. 763-769
FRANK FITZGERALD, Trustee for Mt. Forest Fur Farms of America, Inc., *Petitioner,* v. ERNEST COCKRELL, et al., *Respondents.*	No. 770
FRANK FITZGERALD, Trustee for Mt. Forest Fur Farms of America, Inc., et al., *Petitioners,* v. ERNEST COCKRELL, et al., *Respondents.*	No. 771

REPLY BRIEF ON BEHALF OF PETITIONERS

(All italics and bold face type are supplied unless otherwise indicated)

RESPONDENTS ARE NOT IN POSSESSION OF RES IN CONTROVERSY.

The opening paragraph of the respondents' brief, which obviously seeks to summarize their case, is so replete with misleading language as to require a reply by the petitioners. It is stated therein that this is an attempt to require the respondents to litigate in a bankruptcy court in Michigan "the respondents' title to mineral property situated in the State of Louisiana near the Gulf of Mexico, of which the respondents have been in undisturbed, exclusive, open and notorious possession for many years."

Nothing could be further from the fact. Mt. Forest, at the time of the filing of the petition for reorganization,

owned and was in physical possession of the 52,000 acre tract of land involved, together with the minerals contained therein. The use of the phrase "title to mineral property situated in Louisiana" is completely misleading. The most that any of the respondents can have under the *settled and established* law of Louisiana, if they are right in all of their contentions, is simply a servitude upon Mt. Forest's property. Such a servitude is but an intangible, incorporeal right to go upon Mt. Forest's land in search of minerals and to reduce to possession and remove any minerals that may be found therein. None of the respondents have, or can claim to have, title to, or possession of minerals, which are fugitives and subject neither to ownership nor possession, separate and apart from the land of which they form a component part.

Conceding, arguendo, that, for the purpose of a reorganization proceeding under Chapter X of the Bankruptcy Act, possession of property in controversy is the sole test of the jurisdiction of the court over such property, and of its jurisdiction to hear and determine summarily claims and controversies relating thereto, a preliminary step to the determination of such possession, is, necessarily the ascertainment and identification of the property in controversy. Upon this phase of the inquiry, the District Court and the Circuit Court, in the case at bar, have differed, and it is this fundamental difference which essentially occasioned the reversal. The Circuit Court considered the *servitude,* and the District Court considered the *lands containing the minerals,* in respect to which the servitude was reserved, as the property in controversy.

What is the property in controversy?

It should be noted that the fact of the reservation of a servitude in Cockrell is not in dispute. What is actually in dispute, are the interests of the respective parties in the fugitive minerals, that is, whether the servitude, by virtue of the language of the reservation, reserves in Cockrell *one-eighth* of all minerals together with the right to lease said *one-eighth,* or *all* the minerals together with the right to lease *all* the minerals. Thus, the dispute is over the minerals.

The determination of the *fact* of possession is for the bankruptcy court whose possession is challenged. *Taubel-Scott-Kitzmiller Company v. Fox*, 264 U. S. 426 (1924). The District Court found as a *fact* that at the date of the filing of the reorganization petition, the debtor corporation was "in the actual, physical and exclusive possession" of the lands in question, and that the petitioner herein succeeded to such possession. (Findings of Fact—17 to 20, Conclusions of Law I, R. 312-313, 330).

Under the *settled* applicable Louisiana law, as above stated, fugitive minerals are not susceptible of ownership or possession apart from the soil of which they form a component part.

Article 505 of the Civil Code of Louisiana very simply and clearly states: "The ownership of the soil carries with it the ownership of all that is directly above or under it. * * *"

We quote from the leading Louisiana decision of *Frost-Johnson Lumber Co. v. Salling's Heirs*, 150 La. 756, 91 So. 207 (1922) wherein the Supreme Court of Louisiana stated:

> "When the original opinion was handed down by Mr. Justice O'Neill on January 5, 1920, this court then held for the *ninth* time *that oil and gas in place are not subject to absolute ownership as specific things apart from the soil of which they form part,* and that a grant or reservation of such oil and gas carried only the right to extract such minerals from the soil. * * * " (150 La. at p. 856, 91 So. at p. 242.)
>
> "We therefore hold that it is the settled jurisprudence of this state *that oil and gas in place are not subject to absolute ownership as specific things apart from the soil of which they form part; and a grant or reservation of such oil and gas carries only the right to extract such minerals from the soil.*" (150 La. at p. 858, 91 So. at p. 243.)

In *Federal Land Bank of New Orleans v. Mulhern,* 180 La. 627; 157 So. 370 (1934), it was said,

> "While the owner of land does not own the fugitive minerals beneath the surface, and they are not susceptible of ownership apart from the land, yet those minerals, while in place in the ground beneath the surface, unsevered, are real estate, a part of the land itself, a part of the realty as much so as timber, coal, iron and salt."

Leading textbook writers on the subject of Louisiana mineral rights have arrived at the same conclusion. In the recent work of *Daggett* on *Louisiana Mineral Rights,* it is stated at page 201:

> "* * * No one would dispute the fact that oil and gas are a part of the realty while in storage within the earth. * * *"

In *Thorton on Oil and Gas*, the rule is thus stated: (Vol. I, p. 72)

> "Oil and gas, until severed from the realty, are as much a part of it as coal or stone. So long as they remain in the ground, outside of an artificial receptacle, at least, as the casing of a well or pipe line, they must be treated as a part of the realty underneath the surface of which they lie."

Thornton's language was adopted verbatim by the Supreme Court of Louisiana in *Rives v. Gulf Refining Co. of Louisiana*, 133 La. 178, 183, 62 So. 623, 625 (1913).

Therefore, of necessity, possession of the land carries with it possession of the unsevered, fugitive minerals "while in place in the ground beneath the surface". This being so, the law of Louisiana is directly in harmony with *Thompson v. Magnolia Petroleum Co.*, 309 U.S. 478 (1940). In the leading case of *Exchange National Bank of Shreveport v. Head*, 155 La. 309, 99 So. 272 (1924), it was definitely held that a bankrupt's possession of the land passed to its Trustee, and that such possession included the minerals contained within the land, since the law of Louisiana recognizes no separate estate in minerals which could be vested in anyone else.

In the case at bar, Mt. Forest has unquestioned possession of the land. The unsevered, fugitive minerals are a component part of the soil and continue as "a part of the land itself" until severed therefrom. It therefore follows that if possession is the test of the bankruptcy court's jurisdiction herein, then the debtor was in possession of the property in controversy at the date of the filing of the reorganization petition. Hence, the Circuit Court

committed reversible error in deciding that the property in controversy was the claimed servitude, and in failing to decide that the land containing the unsevered minerals was the *res* before the court.

RESPONDENTS HAVE NO TITLE AND HENCE NO SERVITUDE AS TO SEVEN-EIGHTHS OF THE MINERALS.

But the misleading character of respondents' opening statement does not cease with a consideration of the problem of possession. Not only is it impossible under Louisiana law to possess fugitive minerals apart from the land of which they form a component part, but it is likewise the *settled* law of Louisiana that a mineral servitude which is called "discontinuous" can be established only by title.* None of the respondents have any title to Mt. Forest's minerals.

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* Art 727 of the Civil Code of Louisiana. Servitudes are either continuous or discontinuous.

Continuous servitudes are those whose use is or may be continual without the act of man.

Such are aqueducts, drains, view and the like.

Discontinuous servitudes are such as need the act of man to be exercised.

Such are the rights of passage, drawing water, pasture and the like.

Art. 766 of the Civil Code of Louisiana. Continuous non-apparent servitudes, and discontinuous servitudes, whether apparent or not, can be established only by a title.

Immemorial possession itself is not sufficient to acquired them.

Immemorial possession is that of which no man living has seen the beginning, and the existence of which he has learned from his elders.

See also:

Goldsmith v. McCoy, 190 La. 320, 182 So. 519 (1938);

Sample v. Whitaker, 171 La. 949, 132 So. 511 (1930);

Ogborn v. Lower Terrebonne Refining & Manufacturing Co., 129 La. 379, 56 So. 323 (1911);

Kohn v. Bellott, 169 La. 352, 125 So. 269 (1929);

Larcade v. Iseringhausen, 153 La. 976, 96 So. 830 (1932).

Not only must a mineral servitude in Louisiana be established by title, but immemorial adverse possession is insufficient to establish such a servitude. This has been clearly stated by *Daggett* in her work on *Louisiana Mineral Rights*, pages 28 and 29:

> *"Acquisition by prescription of a discontinuous servitude whether apparent or not, is illegal. 'Immemorial possession itself is not sufficient to acquire them.' It would appear that a user of a mineral right can never establish title.* * * *"

It therefore follows that the fact that the respondent oil and sulphur companies have been removing oil and sulphur from Mt. Forest's property for a number of years, that they have hundreds of employees working upon Mt. Forest's property, and that they have invested large sums of money in the equipment placed upon Mt. Forest's property, in no way serves to establish a title to a servitude to Mt. Forest's minerals in any of the respondents.

The fact is that Mt. Forest has never granted to any of the respondents a servitude as to its minerals, and none of the respondents can establish a title thereto as required by the Louisiana law. The record is replete with evidence of the repeated attempts of Cockrell, the oil companies, and the sulphur company to obtain some sort of written conveyance from Mt. Forest, but during the entire past ten years Mt. Forest has never given any lease, contract or conveyance or any other instrument to any of the respondents authorizing them to remove Mt. Forest's minerals. (R. II - 582-4; IV - 2311; 1612; 1590; 1693.)

As defined by the Civil Code of Louisiana, *supra*, some examples of discontinuous servitudes are such as the rights of passage, drawing water, pasture, and the like. Under the decision of the Court of Appeals it would follow that the bankruptcy court would not have the right to determine either the existence or the extent of such rights, which some party claimed as a burden upon land to which the bankrupt had uncontroverted title. Petitioners submit that such was not the intention of Congress in its passage of the Chandler Act.

Accordingly, meeting the opposition on their own ground, petitioners submit that the respondents have neither title to nor possession of the minerals contained within the land owned and possessed by Mt. Forest; that under both Louisiana and federal law the District Court in Detroit properly took jurisdiction of the within controversy.

RESPONDENTS HAVE MISINTERPRETED THE SO-CALLED "BONUS" CASE OF MT. FOREST FUR FARMS OF AMERICA, INC. vs. COCKRELL, 179 LA. 795, 155 SO. 228 (1934).

Respondents have argued that the District Court's findings are not entitled to consideration, since it disregarded the decision of the Supreme Court of Louisiana in the so-called "Bonus" case of *Mt. Forest Fur Farms of America, Inc. v. Cockrell*, 179 La. 795, 155 So. 228 (1934). An excerpt from that case is quoted on page 4 of respondents' brief to the effect that Cockrell "unquestionably retained for himself * * * * the perpetual and exclusive right to make and execute mineral leases on all or any portion of the land." This is a correct quotation, and we have no quarrel with it.

However, on page 34 of their brief the respondents draw an entirely unwarranted conclusion therefrom, that this case "settled Cockrell's power to lease all of the mineral rights here in controversy * * *".

Petitioners have never denied that Cockrell had a right to make and execute exclusive leases as to his one-eighth interest in the minerals, but that is a far cry from the incorrect statement that he had a power to lease all of the minerals including Mt. Forest's seven-eighths thereof.

As petitioners have stated in their principal brief, one of the two ultimate issues to be decided on the merits is the extent of Cockrell's power to lease. Most assuredly he could make a lease, but the whole lawsuit hinges about the simple question, "What minerals could he lease?" This question was not before the court and was not decided in the *Mt. Forest-Cockrell* case above cited, as is clearly shown by the excerpt quoted in respondents' brief.

The so-called "Bonus" suit was tried upon pleadings alone, the defendant having filed the equivalent of a common law demurer. The only point involved was whether Cockrell was entitled to keep the bonus that he had received for the lease made by him to Gulf in March, 1928. That was the sole issue submitted and the sole point decided in that case.

THERE IS NO HARDSHIP UPON ANY OF THE RESPONDENTS IN THIS PROCEEDING.

Respondents argue that it was never intended by Congress that there should be such a hardship imposed upon

them as the Trustee here seeks, viz., requiring them to come to Detroit, a thousand miles from Louisiana, to try the title to property located in Louisiana.

Petitioners believe that this Court is interested in a realistic approach to this so-called "hardship". As shown by the record, Cockrell has already received over One and a Half Million Dollars in royalties from minerals removed from Mt. Forests' property. (R. IV-1622, 2113) The respondent oil and sulphur companies, as shown by the record, have already removed over Twenty-five Million Dollars worth of oil and sulphur from Mt. Forest's property. (R. IV-1621, 2138) The oil and sulphur companies, as shown by the record, have a combined worth of over Six Hundred Million Dollars. (R. IV-2125-28) Mt. Forest is in reorganization. We submit that it is obvious that from a pragmatic point of view the real hardship has for ten years been placed upon the shoulders of Mt. Forest, crippled because of lack of funds and capital, in its attempts to obtain what is rightfully due it from the respondents.

Moreover, this very point was considered by Congress in the drafting of the Chandler Act. In the colloquy between Honorable Walter Chandler, Representative in Congress from the State of Tennessee, and Mr. Jacob I. Weinstein, a member of the National Bankruptcy Conference, and Chairman of its Committee for the drafting of the Chandler Act, referred to on pp. 29 and 30 of petitioners' brief in support of certiorari (Hearing before Committee on Judiciary, Seventy-fifth Congress, First Session, H. R. 8046, pp. 241 and 242), a letter was introduced in the record from a complaining attorney in Longview, Texas.

We quote a few short paragraphs from that letter:

> "We want to call to your attention what is happening under the new bankruptcy act, known as section 77B.
>
> "If you will refer to *Ex Parte Baldwin* (219 U.S. 610, 78 L. Ed. 1920) and *Chandler v. Perry* (74 Fed. (2d) 371), they will give you some idea.
>
> "We have several instances now where citizens of Texas have been ordered to Detroit, St. Louis, and other points to contest the title of real estate in the bankruptcy courts—this real estate being situated in Texas and controlled only by the laws of Texas, and, of course, desire to have litigation, if any there is, in regard to their property where the courts are acquainted with the rules of property and the holding of the courts with reference thereto.
>
> "It seems to us unfair that they can force a citizen of Texas who owns his property to come to Detroit, to St. Louis, or to Maine to contest the title to his property with some defunct corporation or some bankrupt individual who really has no substantial claim or right to the property. It certainly is confiscation, so far as the ordinary individual is concerned."

The answer made thereto by Mr. Chandler was:

> "I think it is better to adhere to your (Mr. Weinstein) suggestion in the bill than to go back to the old idea of ancillary receivers and litigations throughout the country."

And Mr. Weinstein (who appears herein as one of the attorneys for the petitioners) answered thus:

"The conference has considered this suggestion, but finds that it is impracticable to remove from the jurisdiction of the bankruptcy court the right to litigate claims against property of which the court has control. It is inconvenient, of course, but it is no different in the case of a creditor who resides in California and has a claim against a company that has gone into bankruptcy, we will say, in the southern district of New York. That is just one of those inconveniences with which litigants must put up."

THE LITIGATION PENDING IN LOUISIANA

Respondents have also made much of the fact that there is a suit pending presently in Louisiana, wherein Mt Forest is the complainant and the respondents are the defendants. But throughout their brief respondents fail to make mention of the fact that all the oil and sulphur companies objected and excepted to the jurisdiction of that court until long after the Trustee had filed his petition for relief against the respondents in the bankruptcy court in Detroit.

As stated in our original brief, the corporate respondents are once again exhibiting their constant preference for trying this litigation in some other court than that in which they find themselves at the present time. The issues between the parties are clearly drawn. We submit that if there ever was a case which required the exercise of jurisdiction by the reorganization court, this is one, and failure of this Court to grant certiorari will

impose hardships upon the trustee and the 3,500 shareholders and creditors, whom he represents, which may well prove insurmountable.

Respectfully submitted,

JACOB I. WEINSTEIN,
ROBERT S. MARX,
FRANK E. WOOD,
EUGENE D. SAUNDERS,
ELDON S. LAZARUS,
ISAAC S. HELLER,
Attorneys for Petitioners.

Supreme Court of the United States

OCTOBER TERM, 1941

Office - Supreme Court, U. S.
JAN 30 1942
CHARLES ELMORE CROPLEY
CLERK

Nos. 763-769

FRANK FITZGERALD, Trustee for Mt. Forest Fur Farms of America, Inc., *Petitioner,*

v.

GULF REFINING COMPANY OF LOUISIANA, GULF REFINING COMPANY, HUMBLE OIL AND REFINING COMPANY, SHELL OIL COMPANY, INC., FREEPORT SULPHUR COMPANY, and ERNEST COCKRELL, GULF REFINING COMPANY OF LOUISIANA, ET AL., *Respondents.*

No. 770

FRANK FITZGERALD, Trustee for Mt. Forest Fur Farms of America, Inc., *Petitioner,*

v.

ERNEST COCKRELL, His Curator Ad Hoc, BRUCE NUNEZ, and Their Attorneys, S. W. Plauche, and the Law Firm of HEROLD, COUSIN & HEROLD, *Respondents.*

No. 771

FRANK FITZGERALD, Trustee for Mt. Forest Fur Farms of America, Inc., MORAN CORPORATION OF THE SOUTH and ISAAC S. HELLER, *Petitioners,*

v.

ERNEST COCKRELL, SIDNEY L. HEROLD, SUMTER P. COUSIN and SAMUEL L. HEROLD; and S. W. PLAUCHE and S. W. PLAUCHE, Jr., Composing the Law Firm of PLAUCHE & PLAUCHE, *Respondents.*

PETITION FOR REHEARING AND FOR RECONSIDERATION OF PETITION FOR WRITS OF CERTIORARI

JACOB I. WEINSTEIN,
ROBERT S. MARX,
FRANK E. WOOD,
EUGENE D. SAUNDERS,
ELDON S. LAZARUS,
ISAAC S. HELLER,
Attorneys for Petitioners.

THE JOHNSON & HARMON CO., LAW PRINTERS

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v.

ERNEST COCKRELL, His Curator Ad Hoc, BRUCE NUNEZ, and Their Attorneys, S. W. Plauche, and the Law Firm of Herold, Cousin & Herold, *Respondents.*

No. 771

FRANK FITZGERALD, Trustee for Mt. Forest Fur Farms of America, Inc., MORAN CORPORATION OF THE SOUTH and ISAAC S. HELLER, *Petitioners,*

v.

ERNEST COCKRELL, SIDNEY L. HEROLD, SUMTER P. COUSIN and SAMUEL L. HEROLD; and S. W. PLAUCHE and S. W. PLAUCHE, JR., Composing the Law Firm of PLAUCHE & PLAUCHE, *Respondents.*

PETITION FOR REHEARING AND FOR RECONSIDERATION OF PETITION FOR WRITS OF CERTIORARI

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioners, FRANK FITZGERALD, Trustee for MT. FOREST FUR FARMS OF AMERICA, INC., THE

MORAN CORPORATION OF THE SOUTH, INC., and ISAAC S. HELLER, respectfully represent unto this Court:

This is a petition for rehearing and for reconsideration of the petition for writs of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit, heretofore filed with this Court and denied by this Court on January 5, 1942.

Petitioner Fitzgerald is a trustee in bankruptcy. The reorganization proceedings in which he was appointed are pending in the United States District Court at Detroit. The principal asset of the debtor corporation is a tract of 52,000 acres of land in Louisiana. The debtor's title is not in dispute. Nor is it disputed that the debtor is in actual physical possession of the surface of the land. The occupancy of a part of the surface of the land by respondent Freeport Sulphur Company arises by virtue of a lease from the debtor corporation, in which its asserted mineral rights are fully reserved. (R. IV—1611.)

The controversy arises over the mineral rights. In Louisiana, as in many states, minerals are considered fugitives, not subject to ownership or possession by anyone, separate and apart from the land of which they form a component part, until severed from the land. The dispute over the minerals can be tersely stated.

Respondent Cockrell owned the land. He contracted to sell it to the debtor

> "subject to a perpetual minerals reservation equal to 1/8 of all minerals . . .". (R. IV—1511)

The deed made in consummation of the contract reserved

> "a perpetual royalty equal to 1/8 of all minerals . . .". (R. IV—1541)

Thereafter, Cockrell made a mineral lease to respondent Gulf who, with Humble and Shell, in turn, subleased to

respondent Freeport. Obviously, Cockrell could not give to the other respondents any greater mineral rights than he had reserved in the deed mentioned above.

Because the debtor was the unquestioned fee simple owner of the land and in actual physical possession of the surface, petitioner, Fitzgerald, immediately following his appointment, filed this suit in the United States District Court at Detroit to protect the property from depletion and to have the debtor's mineral rights judicially determined.

Respondents urged the District Court to relinquish jurisdiction on the authority of *Thompson* v. *Magnolia Petroleum Co.*, 309 U. S. 478, and *Railroad Commission of Texas* v. *Pullman*, 312 U. S. 496, because the record disclosed that a plenary suit was pending (*Mt. Forest et al.* v. *Cockrell et al.*, No. 1190, 25th Judicial District Court, Plaquemines Parish, La., R. IV—1959) in the State court which had jurisdiction over all the parties and where a complete and authoritative adjudication of the entire controversy could be had. This argument prevailed in the Circuit Court of Appeals although the sincerity of the respondents on this point was questioned because they had steadfastly challenged the State court's jurisdiction until after the instant suit was brought.

Now, immediately after the denial of certiorari, having used the State court proceedings solely for the purpose of ousting the Federal Court of jurisdiction, and after the debtor's rights have been substantially affected by statutes of limitation, the respondent, Cockrell, moves to dismiss the State court suit under a non-prosecution statute (Louisiana Civil Code, Section 3519, app. p. 7). It is argued that said motion to dismiss must be granted as a matter of course, notwithstanding the fact that the Trustee in bankruptcy was precluded from participation in that case while

the present case was pending. A copy of said motion is attached in full in the appendix hereto (pp. 5-7).

In *Pennsylvania* v. *Williams,* 294 U. S. 176, it is clearly pointed out that the Federal courts, before they relinquish jurisdiction in favor of the State courts, must be satisfied that the rights of the litigants will not be sacrificed in so doing. An examination of the record in the instant case will disclose clearly that the respondents resisted the jurisdiction of the State court up until after this suit was filed. Then, they admitted jurisdiction of the State court for the very purpose of asking the Federal Court to relinquish jurisdiction. Immediately after the Federal Court relinquished jurisdiction because of the State court proceedings, they now move to dismiss the State court proceedings on the statutory ground of lack of prosecution while the Federal Court proceedings were in process. This would put the petitioner, Fitzgerald, Trustee in bankruptcy of the debtor, in a position where he is required to institute a new suit in the State court after his rights have been materially affected by statutes of limitations. It is submitted that the Federal Court should not relinquish jurisdiction under such circumstances. *Thompson* v. *Magnolia Petroleum Co.,* 309 U. S. 478; *Railroad Commission of Texas* v. *Pullman,* 312 U. S. 496.

Wherefore, for the foregoing reasons your petitioners respectfully urge that a rehearing be granted and that this court reconsider the petition for writs of certiorari heretofore filed herein.

Respectfully submitted,

JACOB I. WEINSTEIN,
ROBERT S. MARX,
FRANK E. WOOD,
EUGENE D. SAUNDERS,
ELDON S. LAZARUS,
ISAAC S. HELLER,
Attorneys for Petitioners.

CERTIFICATE OF COUNSEL

I, the undersigned, one of the counsel for the above named appellant, do hereby certify that the foregoing motion for rehearing is not presented for purposes of vexation or delay, but is, in my opinion, well founded in law and fact and proper to be filed herein.

FRANK E. WOOD,
Attorney for Petitioners.

APPENDIX A

No. 1190

25TH JUDICIAL DISTRICT COURT
PARISH OF PLAQUEMINES
STATE OF LOUISIANA

MT. FOREST FUR FARMS OF AMERICA, INC., ET AL.

v.

ERNEST COCKRELL, ET AL.

To Mt. Forest Fur Farms of America, Inc., through Lazarus, Weil & Lazarus, its counsel of record.

NOTICE IS HEREBY GIVEN to each of the plaintiffs, through his or its counsel of record, that a rule has issued herein, directed to each of the plaintiffs, ordering and commanding them, to show cause, on the 19th day of February, A. D. 1942, why the above numbered and entitled suit should not be dismissed, for the reason that the plaintiffs must be considered as having abandoned the same inasmuch as five years have elapsed since plaintiffs made their demand without the plaintiffs or any of them having taken any steps in the prosecution thereof.

By order of the Court:

Witness the Honorable Henry L. Himel, Temporary Judge.

Parish of Plaquemines, January 22, 1942.

A. L. LOBRANO,
Clerk of Court.

No. 1190

TWENTY-FIFTH JUDICIAL DISTRICT COURT OF LOUISIANA, IN AND FOR THE PARISH OF PLAQUEMINES

MT. FOREST FUR FARMS OF AMERICA, INC., et al.,

v.

ERNEST COCKRELL, et al.

MOTION OF DEFENDANTS, ERNEST COCKRELL AND HEROLD, COUSIN & HEROLD, TO DISMISS THE ABOVE NUMBERED AND ENTITLED SUIT AS HAVING BEEN ABANDONED BY THE PLAINTIFFS

On motion of Plauche and Plauche, and Herold, Cousin & Herold, counsel of record for the defendants, Ernest Cockrell, the firm of Herold, Cousin & Herold, and the individual members thereof, and on their suggesting to the Court that more than five years have elapsed since the plaintiffs made their demands in the above numbered and entitled cause, without the plaintiffs, or any of the plaintiffs, having taken any steps in the prosecution thereof; and on their further suggesting to the Court that the plaintiffs, and each of them, must be considered as having abandoned the above numbered and entitled suit; and on their further suggesting to the Court that your defendants are entitled, therefore, to have the said suit dismissed; all as provided by Article 3519 of the Revised Civil Code of Louisiana, as amended;

IT IS ORDERED that a rule issue herein, directed to each of the plaintiffs, through his or its counsel of record, ordering and commanding them, and each of them, to show

cause, on the 19th day of February, A. D., 1942, why the above numbered and entitled suit should not be dismissed, for the reason that the plaintiffs must be considered as having abandoned the same inasmuch as five years have elapsed since plaintiffs made their demand without the plaintiffs or any of them having taken any steps in the prosecution thereof.

Donaldsonville, Louisiana, January 20, A. D., 1942.

HENRY L. HIMEL,
District Judge.

Of Counsel:

HEROLD, COUSIN & HEROLD,
By S. W. PLAUCHE, JR.,
PLAUCHE AND PLAUCHE.

APPENDIX B

Article 3519 of the Civil Code, which appears under the Chapter dealing with prescription, provides (as amended by Act 107 of 1898):

> "If the plaintiff in this case, after having made his demand, abandons or discontinues it, the interruption shall be considered as having never happened.
>
> "Whenever the plaintiff having made his demand shall at any time before obtaining final judgment allow five years to elapse without having taken any steps in the prosecution thereof, he shall be considered as having abandoned the same."